

Missouri Attorney General's Opinions - 1957

Opinion	Date	Topic	Summary
1-57	Feb 5	TAXES. INCOME TAXES. CORPORATIONS. CORPORATION INCOME TAXES. EXEMPTIONS. TAX EXEMPTIONS. TAXATION.	Land O'Lakes Creameries Inc., a Minnesota corporation, is liable for taxation on its income under the Missouri Income Tax Law.
1-57	Feb 21	ACCOUNTANCY BOARD. QUALIFICATIONS. RECIPROCITY.	Qualifications for a nonresident to obtain a certificate as a certified public accountant or public accountant in this state.
1-57	Apr 24	FICTITIOUS NAME. SECRETARY OF STATE.	Proprietors are not required to register when operating under their name with such words as "company" or "and company" or words descriptive of the character of business are added thereto.
1-57	June 12	TAXATION. INCOME TAX. DIRECTOR OF REVENUE. TAXES. TAX RETURNS.	When no income tax return is filed, director of revenue has four years from date on which taxpayer is required by law to file return to make assessment. Director of Revenue has four years from date return was actually filed to make additional assessments.
2-57	Jan 29	ECONOMIC POISONS. DEPARTMENT OF AGRICULTURE.	Products for eliminating internal worms from hogs, poultry, or other animals are not subject to registration under the Missouri Economic Poisons Act. All 100% paradichlorobenzene or 100% naphthalene products of a company, all of which bear the same or a portion of the same claims, can be registered as one economic poison under the Missouri Economic Poisons Act, and only one registration fee has to be paid thereon.
2-57	Feb 1	DEPARTMENT OF AGRICULTURE. ECONOMIC POISONS LAW.	Paints resistant to mildew on the paint film only are not economic poisons within the meaning of the Missouri Economic Poisons Law.
2-57	June 12	SHERIFFS. FEES AND MILEAGE.	Where, by order of court, the sheriff of Christian County went to St. Louis, Missouri, and transported a witness in a criminal case to Christian County, sheriff cannot be compensated for so doing. Where, by order of the circuit court, the sheriff of Christian County,

			went to the Missouri State Penitentiary in Jefferson City, secured therefrom a prisoner and transported him to Christian County to serve as a witness in a criminal case, after which the sheriff transported such witness back to the Missouri State Penitentiary, sheriff cannot be compensated for such service.
2-57	Dec 10	COUNTY ASSESSOR. CONTRACT WITH COUNTY.	A county assessor in a fourth class county may bid on work which consists of making a fill in a county road, which contract will be let by the county court to the lowest acceptable bidder.
3-57	Mar 27	Hon. Newton Atterbury	WITHDRAWN
3-57	Oct 2	OFFICERS. STATE OFFICERS. EMPLOYEES. STATE EMPLOYEES. RETIREMENT. STATE RETIREMENT SYSTEM. STATE EMPLOYEES' RETIREMENT SYSTEM. UNIVERSITY OF MISSOURI. MISSOURI UNIVERSITY. CURATORS OF UNIVERSITY OF MISSOURI. COLLEGES. STATE COLLEGES. STATE TEACHERS COLLEGES. TEACHERS COLLEGES.	Employees of the University and colleges who are not covered under some other retirement or benefit fund to which the state is a contributor (not counting contributions under the Federal Old Age and Survivors' Insurance Act) qualify under the law to become members of the Missouri State Employees' Retirement System.
3-57	Oct 7	OFFICERS. STATE OFFICERS. EMPLOYEES. STATE EMPLOYEES. STATE RETIREMENT SYSTEM. STATE EMPLOYEES' RETIREMENT SYSTEM. PUBLIC SCHOOL RETIREMENT SYSTEM. TEACHERS'	The director and employees of the Public School Retirement System do not qualify under the law, and do not become members of the Missouri State Employees' Retirement System.

		RETIREMENT SYSTEM.	
3-57	Oct 7	OFFICERS. STATE OFFICERS. EMPLOYEES. STATE EMPLOYEES. RETIREMENT. STATE RETIREMENT SYSTEM. CIVIL DEFENSE. STATE SURVIVAL PLANS PROJECT. SURVIVAL PLANS PROJECT.	Personnel of the Missouri State Survival Plans Project qualify under the law to become members of the Missouri State Employees' Retirement System.
3-57	Oct 14	OFFICERS. STATE OFFICERS. EMPLOYEES. STATE EMPLOYEES. STATE EMPLOYEES' RETIREMENT SYSTEM. STATE RETIREMENT SYSTEM. INSURANCE. DIVISION. DIVISION OF INSURANCE. EXAMINERS. INSURANCE EXAMINERS. EXAMINERS OF THE DIVISION OF INSURANCE. EXAMINERS IN THE DIVISION OF INSURANCE.	Examiners in the Division of Insurance qualify under the law and become members of the Missouri State Employees' Retirement System.
3-57	Oct 18	OFFICERS. STATE OFFICERS. EMPLOYEES. STATE EMPLOYEES. RETIREMENT. STATE RETIREMENT SYSTEM. MAGISTRATES.	Court reporters, magistrate clerks and magistrates are not covered by the Missouri State Employees' Retirement System Law.

		CLERKS OF MAGISTRATE COURTS. MAGISTRATE CLERKS. CIRCUIT COURT REPORTERS. REPORTERS OF CIRCUIT COURTS. STATE EMPLOYEES' RETIREMENT SYSTEM.	
4-57	Aug 8	COUNTY COURT. COUNTY BUDGET. NURSING HOMES.	Right of county court to expend proceeds of sale of county farm during 1957 and 1958.
5-57	Jan 21	CONSTITUTIONALITY.	Sections 390.171 and 390.176, RSMo 1949, are constitutional.
5-57	June 28	RECORDING OF TELEPHONIC COMMUNICATIONS	Where authorities of State Hospital No. 1 obtain consent of relative or person authorized to give such consent for an operation or autopsy to be performed upon an inmate of State Hospital, having a state hospital employee "listen in" to the conversation would be permissible. Also permissible to have a recording machine attached to the telephone at the State Hospital, which machine would record the conversation giving consent. Such recording machine would be subject to regulations set forth in the order of the Missouri Public Service Commission.
6-57	Jan 7	SHERIFFS.	A person appointed to fill a vacancy in the office of sheriff, which vacancy occurred less than nine months prior to the holding of a general election, at which election a sheriff was elected for a full four year term, would continue in the office of sheriff until the first day of the succeeding year and until a person elected to the office at the general election was duly qualified.
6-57	Jan 15	SPECIAL ROAD DISTRICTS. COMMISSIONER SELLING ROAD BUILDING MATERIAL OR LABOR TO DISTRICT, NOT GUILTY OF CRIME. WHEN.	Commissioner of special city or town road district, non-township organization county, organized under Secs. 233.010 to 233.165 RSMo 1949, who in individual capacity, sells material and labor for building and repairing district roads to commission of which he is a member; absent fraud, transaction is not criminal offense, and commissioner will not have violated Sec. 61.300 or Secs. 61.170 to 61.300 RSMo 1949, and cannot be found guilty of a misdemeanor; cannot be punished as provided by Sec. 61.310 RSMo 1949, and will not violate any other criminal statutes.
9-57	Mar 6	NATIONAL PARKS. PARKS. FEDERAL	Sections 12.020, 12.010, and 95.525, RSMo 1949, cedes exclusive jurisdiction to the Federal Government of the George Washington Carver National Monument and the Jefferson National Expansion

		JURISDICTION. STATE JURISDICTION. JURISDICTION. JURISDICTION OF NATIONAL PARKS.	Memorial, only to the extent the federal government accepts said jurisdiction; and State of Missouri still retains jurisdiction over said two pieces of property.
9-57	Apr 26	CRIMINAL LAW. PUNISHMENT. GOVERNOR.	Sentence to hang should be modified to conform to present punishment for death. Any delay in executing death sentence against Barbata from 1944-1957 does not prevent executing sentence at this time.
9-57	June 17	GENERAL ASSEMBLY. CONSTITUTION. STATUTES.	When a bill is finally passed by both houses of the General Assembly and approved by the governor, the constitutionality of the resulting law cannot be successfully challenged on the ground that the presiding officer of the Senate failed to sign the bill.
14-57	Oct 31	TAXATION. COUNTY COURTS.	The county court has no authority to relieve the collector from the collection of penalties and interest due on account of delinquent taxes.
15-57	Jan 7	OFFICERS. KANSAS CITY BOARD OF ELECTION COMMISSIONERS.	Subsection 4 of Section 117.050, RSMo, requires the Kansas City Board of Election Commissioners to keep its office open during business hours of each week day, excluding Sundays and legal holidays. Board is unauthorized to close its office Saturday afternoon of each week.
15-57	June 21	DIVISION OF WELFARE. LICENSING MASONIC HOME OF MISSOURI. CHILDREN.	There is no duty or responsibility of the State Division of Welfare to require a license nor to inspect that portion of the Masonic Home of Missouri devoted to the caring for children, because the Home neither advertises nor holds itself out as conducting a boarding house or place of residence for children.
15-57	July 17	AID TO DEPENDENT CHILDREN. HOUSE BILL NO. 69.	It is the duty of the Division of Welfare to pay Aid to Dependent Children benefits to children 16 and 17 years of age, who otherwise qualify for such benefits, on and after August 29, 1957.
15-57	Oct 15	INMATES OF THE PENITENTIARY. STATE PARKS. LABOR OF INMATES.	Labor of inmates of the Missouri State Penitentiary may be used in improving the parks belonging to this state.
16-57	Feb 7	UNITS. ELECTION. COSTS.	County Health Unit Election would be valid if held on the same day as township elections; necessary as set forth in the statute, Section 205.010, RSMo Cum. Supp. 1955; county would bear the expense of the election; county and townships in the county would not share this election expense.
16-57	Feb 27	SALES TAX.	A record of all sales tax returns made to the department of revenue

		RECORDS.	must be kept; no authority exists for destroying these records at any time. Such records may be preserved by microfilming or photographing, and when such records are reproduced in this manner the original record may be destroyed.
16-57	Mar 27	TAXES. TAXATION. TRUST ESTATES. WILLS. COLLECTOR OF TAXES. EXEMPTION FROM TAXES. EXECUTOR AND ADMINISTRATOR.	Executor has duty of paying taxes assessed and levied against property for 1956, wherein testatrix dies before said taxes are paid, and wherein she leaves her property for charitable purposes. Collector may collect taxes if executor does not pay them.
16-57	May 2	SCHOOLS. SCHOOL DISTRICTS. TAXES.	Where common school district is divided by reorganization plan after levy and assessment of taxes, tax moneys collected for current year should be paid to such common school district. Upon division of district by reorganization plan, county board of education has reasonable time after expiration of sixty days within which to annex remaining portion of divided district to adjoining district.
18-57	Jan 22		Opinion letter to the Honorable William A. Collet
18-57	Jan 23	MENTAL HEALTH. INSANE PERSONS.	Recovery of competency inquiry provided for in Sec. 475.360 RSMo Cum. Supp. 1955 need not be employed to qualify person to serve as administrator of an estate subsequent to such person's discharge as a "mentally ill individual" under authority of Sec. 202.827 RSMo Cum. Supp. 1955.
18-57	Mar 22	PROBATE. PROBATE JUDGE. PROBATE COURT.	Probate judge in county having more than thirty thousand and less than seventy thousand inhabitants, and assessed valuation over thirty million dollars, may not pay in excess of three thousand dollars per annum for clerk hire.
18-57	May 8	TAXATION. COUNTY BOARD OF EQUALIZATION.	In performing its duties a county board of equalization cannot reduce the aggregate assessed valuation of property within the county below the aggregate assessed valuation thereof, as fixed and determined by the State Tax Commission for the same year.
18-57	June 6	FORFEITURE OF RECOGNIZANCE.	In proceeding upon a forfeiture of a recognizance, Supreme Court Rule 32.12 should be followed rather than Section 544.640, RSMo 1949.
18-57	June 10	INSURANCE.	Pre-arranged funeral contract described in opinion is a contract of insurance and offering of the same to the public without meeting licensing requirements of Missouri's insurance code violates Sections

			375.300 and 375.310 RSMo 1949.
18-57	June 17	INSANE PERSONS. EXAMINATION BY PHYSICIANS.	Probate Court may compel alleged insane persons to submit to an examination by a physician following an application for involuntary hospitalization.
18-57	June 28	TAXATION. COUNTY COURTS. COUNTY BOARDS OF EQUALIZATION.	The county court or county board of equalization cannot reassess real estate and tangible personal property or abate taxes arising by virtue of a regular and proper assessment where subsequent to the assessment date the property is totally or partially destroyed.
18-57	July 2	NEWSPAPERS. LEGAL PUBLICATION.	Requirements of Section 493.050 RSMo 1949, that a newspaper be entered as second class matter at post office in publication city, and that a newspaper shall have been legally and consecutively published for three years, means three years from date first issue was actually published, and not three years from date second class permit was issued. A weekly newspaper which actually began legal and consecutive publication on June 11, 1954, and has continued uninterrupted to the present, but obtained postal permit on October 11, 1954, three year publication period began June 11, 1954 and not on October 15, 1954. If newspaper has complied with other requirements of said statute, it is qualified to publish all legal notices as of June 11, 1957.
18-57	Oct 21	LOTTERIES.	In the determination of the winner of a contest in which the winner is determined by the judgment of the comparative merits of statements within twenty-five words or less, which statements begin, "I like to trade at Crown Drug Stores because," they are determined upon skill, and not upon chance, and although such operation may entail the elements of consideration and prize, yet the operation is not a lottery within the meaning of lottery laws of Missouri inasmuch as the third and necessary element of chance is not present.
19-57	June 21	Hon. Russell Corn	WITHDRAWN
20-57	Oct 29	Hon. Claude E. Curtis	WITHDRAWN
21-57	Jan 24	GAMBLING DEVICES. PINBALL MACHINES. MINORS.	A pinball machine which pays off only in free games is not a gambling device. No law which prohibits the playing of pinball machines by minors in Missouri.
21-57	Nov 27	SCHOOLS. SCHOOL DISTRICTS.	Data on average daily attendance for school year 1956-1957 used in determining average daily attendance of proposed enlarged district submitted to voters as plan of county board of education when such plan is submitted to voters after June 30, 1957 and before July 1, 1958.
21-57	Dec 10	LINCOLN UNIVERSITY.	Sec. 172.300, RSMo, Cum. Supp. 1955, does apply to curators of

		TEACHERS' RETIREMENT SYSTEM.	Lincoln University with respect to the use of state appropriated funds for retirement, disability and death plans.
22-57	Jan 17	WATERS. STATE. STATE PARK BOARD.	Authority to construct fences across artificial lake covering state-owned land.
24-57	June 7	COUNTY COURT. COUNTIES. COUNTY ASSESSOR. ASSESSOR.	The county court of a county of the third class cannot withhold from the compensation due the assessor for performing his duties an amount equal to any overpayment for prior years. Further, the county court may, by appropriate action, recover back any overpayments previously made to the county assessor.
25-57	Aug 5	OCCUPATIONAL DISEASES. MUNICIPALITIES. FIRE DEPARTMENTS.	It is not the intent of Section 292.300, RSMo 1949, to require municipal governments who operate and maintain fire departments that employees in that department come within its provisions.
26-57	Aug 12	Hon. Thomas Eagleton	WITHDRAWN
28-57	Jan 9	SCHOOLS. SCHOOL DISTRICTS. OFFICERS. CONTRACTS.	If chairman of board of education employed by transportation company which furnishes school transportation to his district has direct or indirect pecuniary interest in transportation contract, such contract is void as against public policy.
31-57	May 9	Hon. Benjamin J. Francka	WITHDRAWN
32-57	Jan 28	CRIMINAL LAW. REPEAL OF RSMo 1949 CRIMINAL STATUTES. HABITUAL CRIMINAL STATUTES. SENATE BILL NO. 27 68 TH GENERAL ASSEMBLY.	Charges under subsection 3 of Section 560.161, RSMo Supp. 1955, relating to stealing by persons with prior convictions, cannot be based upon prior convictions obtained under statutory provisions which were repealed by the bill which enacted Section 560.161.
32-57	Mar 27	WILDLIFE CODE. CONSERVATION CODE. RULES AND REGULATIONS.	Sale of wild rabbits in Missouri prohibited to everyone, resident or nonresident. Farmer in Illinois taking opossums on his farm cannot sell same or the products thereof in Missouri.
32-57	July 3	ST. LOUIS. FLOOD CONTROL. COOPERATIVE	St. Louis in contract with United States for flood control project may sign contract providing city will provide lands and easements for the project, will hold the United States free from damages, and maintain

		AGREEMENTS. LEVEES.	and operate the flood control works after completion.
32-57	Aug 8	COUNTIES. CHARTER FORM OF GOVERNMENT. ST. LOUIS COUNTY POLICE DEPARTMENT.	St. Louis County Police Department has authority to enforce state law in incorporated or unincorporated areas in the county.
32-57	Sept 9	ASSESSMENT OF STATE PROPERTY BY A SECOND CLASS CITY FOR STREET IMPROVEMENT.	The property of State Hospital No. 2, which is owned by the State, located in the City of St. Joseph, Missouri, is not subject to assessment by the city for the purpose of repairing a street which runs through the property of the aforesaid State Hospital No. 2.
32-57	Sept 9	Hon. Edward W. Garnholz	WITHDRAWN
32-57	Nov 8	Hon. William J. Geekie	WITHDRAWN
32-57	Dec 9	Hon. Edward W. Garnholz	WITHDRAWN
32-57	Dec 20	CORONERS. PROSECUTING ATTORNEYS. CRIMINAL LAW.	No discretion vested in coroner as to report required by Section 58.370. It is not necessary for report to be made by sworn affidavit. Report must be based upon the verdict of the coroner's jury. Judge has no discretion other than to issue warrant required by Section 58.370. The prosecuting attorney may enter state's nolle prosequi.
33-57	Jan 24	LEGISLATURE. OFFICERS. TRAVEL EXPENSES. LEGISLATIVE RESEARCH COMMITTEE. COMMITTEES. COUNCIL OF STATE GOVERNMENTS.	Members of the Committee on Legislative Research who were authorized by the Committee to represent the Committee at meetings of the National Legislative Conference in Miami, Florida, in 1955, and in Seattle, Washington, in 1956, could be legally reimbursed, from funds appropriated for the use of the Committee, for expenses necessarily incurred by them in attending such meetings.
33-57	Feb 28	COUNTY COURT. COUNTY HOSPITALS.	County hospital has been established when properly originated and the bond election has carried; no authority to pay from the general revenue of a county for an advertising or publicity campaign preceding bond election.
33-57	June 3	FEES AND SALARIES. TOWNSHIPS.	Fees allowed township trustee as ex officio treasurer under Sec. 65.230 (3) RSMo, Cum. Supp. 1955 computed by applying statutory

			percentages to “all moneys” received and disbursed rather than to each transaction involving receipt and disbursement.
33-57	June 17	CRIMINAL COSTS. SHERIFF’S MILEAGE. SCHOOLS. ENLARGED DISTRICTS. ELECTION OF DIRECTORS. PRINTED BALLOTS REQUIRED.	1. When sheriff serves criminal warrant while driving on official business not connected with case, and claims mileage under provisions of § 57.300, RSMo 1949; if warrant served more than five miles from place of trial, he is entitled to mileage at ten cents per mile for each mile actually traveled, under said section. 2 (a). Examination and, certification of criminal fee bills under provisions of § 550.190, RSMo 1949, a discretionary duty of circuit judge. He is required to examine and certify the sheriff’s mileage when court costs are paid by the state. No statutory duty of judge to examine and certify mileage of sheriff of third and fourth class counties when criminal costs to be paid by county and sheriff’s mileage exempt under provisions of § 57.410, RSMo 1949. 2(b). Examination and certification of criminal fee bills of cases finally determined in magistrate court, a discretionary duty of magistrate. No statutory duty of magistrate to examine and certify mileage of sheriff of third or fourth class county when criminal costs to be paid by county and sheriff’s mileage exempt under provisions of § 57.410, RSMo 1949. 3. In election of directors of enlarged school district, printed ballots are necessary to valid election under provisions of § 165.687, 111.400, RSMo 1949, and 165.330, RSMo Cum. Supp. 1955.
35-57	Feb 28	CRIMINAL COSTS. CRIMINAL LAW. COSTS. MOTOR VEHICLES.	The county is liable for the costs of a prosecution for failure to report a motor vehicle accident commenced under Sec. 303.370 RSMo Cum. Supp. 1955, if the defendant is found guilty and is unable to pay the costs.
35-57	Apr 29	TAXATION.	Residential property at 127 East Circle Drive, Jefferson City, Missouri, owned by Missouri Council of Churches, exempt from taxation under Article X, Section 6, of Missouri’s Constitution of 1945, and Section 137 (6) RSMo 1949.
35-57	June 17	“CONVICTED” DEFINED. LIQUOR LAW.	The word “convicted” as used in numbered paragraph 2 of Section 312.510, RSMo 1949, includes within its meaning a plea of guilty, as does a trial before the court which results in a finding of guilt.
35-57	Oct 21	MOTOR VEHICLES. OPERATOR’S AND CHAUFFEUR’S LICENSES. CRIMINAL LAW.	Subsection 4 of Section 302.010 is constitutional. Driver’s license may be suspended for convictions in proper court while convictions may be on appeal.
37-57	May 14	DEPT. OF CORRECTIONS.	Amounts paid from penitentiary personal service appropriations may be credited against the amount owed by penitentiary for purchases for penitentiary farms.

37-57	July 29	BOARDING HOMES FOR CHILDREN. SENATE BILL NO. 41.	The home for children, known as the Convent of the Good Shepherd, located at 3801 Gravois Avenue, St. Louis, Missouri, is not subject to the provisions of Senate Bill No. 41, enacted by the 69 th General Assembly of Missouri.
37-57	Aug 1	SIGNING DEATH CERTIFICATES. DEFINITION OF "PHYSICIAN".	A dentist is not a "physician" as that term is used in the Laws of Missouri authorizing a "physician" to sign a death certificate under certain circumstances.
37-57	Sept 19	APPROPRIATIONS. PENITENTIARY. DEPARTMENT OF CORRECTIONS.	Use of funds appropriated in Section 1, House Bill No. 312, Sixty-ninth General Assembly, for "Additions, Repairs and Replacements" at penal institutions.
39-57	Jan 2	MISSOURI CONSERVATION COMMISSION. REGULATIONS FOR LAKE WAPPAPELLO.	Regulations promulgated by the Missouri Conservation Commission, which regulations are that decoys shall not be left unattended in the Lake Wappapello area and that shooting blinds erected by private individuals in that area may be occupied by the first person who reaches them and finds them vacant are within the power of the Conservation Commission to make.
39-57	Jan 23	Hon. Rex A. Henson	WITHDRAWN
40-57	Oct 15	EGGS. EGG LAW.	A farmer selling eggs produced by his flock on his farm to customers in a town via door to door route need not grade or label said eggs nor does he need a license to sell said eggs as a door to door route is not an established place of business as referred to in Sections 196.313 and 196.328, RSMo Cum. Supp. 1955.
41-57	Jan 11	MISSOURI REAL ESTATE COMMISSION.	The Missouri Real Estate Commission cannot pay to the Missouri Real Estate Association twenty-five dollars a month for postage on the Missouri Real Estate Association Bulletin, as the legislature has not appropriated funds to the Commission for that purpose.
41-57	May 20	STATE AUDITOR. BIENNIAL AUDIT OF SIX-DIRECTOR SCHOOL DISTRICT.	An audit made by the State Auditor pursuant to a petition by parties in a school district under Section 29.230, is, where such audit follows the requirements of Section 165.115 and is accepted by the board of directors, sufficient to obviate the necessity of the board of directors of a six-director school district to arrange for the biennial audit required in Section 165.115, RSMo 1955 Cum. Supp.
46-57	Feb 19	ASSESSORS. TAXATION. REVENUE. COUNTIES.	County assessor or deputies of all counties except class one counties and the City of St. Louis must call at office, place of doing business or residence of each property owner in county and require them to make a list of all taxable real and tangible personal property owned by such person in county. Property owner has the duty to fill in the

			valuation of all real and personal property included in assessment list.
46-57	June 19	SPECIAL ROAD DISTRICTS.	Submission and approval of question of disorganization of special road district under authority of Sec. 233.160 RSMo 1949 does not prohibit immediate formation of new district under applicable statutes.
46-57	Aug 15	PROSECUTING ATTORNEYS. SALARY INCREASE. SENATE BILL NO. 198.	Prosecuting attorneys in third and fourth class counties are not entitled to receive the additional compensation provided by Senate Bill No. 198, enacted by the 69 th General Assembly, during their present terms of office.
46-57	Oct 28	CAPITAL ASSETS. REAL PROPERTY "USED IN A TRADE OR BUSINESS."	Whether or not real property is "used in a trade or business" so as to be excluded from the definition of Capital Asset as such is defined in Section 143.100 (2) Cum. Supp. 1955, RSMo 1949, is a factual determination to be made in each case. Gains and losses from capital assets treated differently under Missouri and Federal law.
48-57	Jan 17	NONINTOXICATING BEER. REVOCATION OF LICENSE.	No person shall be granted a permit or license to sell nonintoxicating beer whose permit or license as such dealer has been revoked or who has been convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, of the violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor or nonintoxicating beer.
48-57	Mar 15	PUBLICATION RATES. PUBLIC ADVERTISEMENTS. CIRCUIT COURTS. COUNTIES OF FIRST CLASS.	Circuit Court en banc in cities of 100,000 population or more has right to set publication rates at a higher figure than those established in Section 493.080, RSMo. 1949. Maximum publication rates in counties of the first class are established by Section 493.030, Cum. Supp. 1955. Where city of 100,000 population or more located in first class county, then publication rate for the city is established pursuant to Section 493.080, supra, and publication rate for county outside the city is that established by Section 493.030, supra.
48-57	Dec 9	MOTOR VEHICLES.	(1). A trailer owned by a farmer and used by him exclusively in hauling farm products or other property between his farm and town and between farms where the highways are used, is not exempt from the requirements of Chapter 301, RSMo, with respect to the registration of trailers and the display of license plates thereon. (2). A farm wagon is not a "trailer" for the purposes of registration.
49-57	Feb 28	JACKSON COUNTY HIGHWAY PATROL. UNIFORMS.	County Court of Jackson County, Missouri, may purchase and furnish uniforms to members of the Jackson County Highway Patrol so long as the ownership of such uniforms remains in the county.
49-57	Aug 8	COUNTY. COUNTY COURT.	Not necessary for Presiding Judge of County Court, Jackson County, Missouri, to sign or indicate his approval on a purchase order.

		PURCHASING AGENT.	
50-57	June 12	CORONERS. CORONER'S INQUEST. DEAD BODIES.	Coroner has authority to exhume body buried before an inquest when he has reasonable grounds to suspect foul play. Coroner has authority to perform autopsy only if necessary to determine cause of death.
50-57	Aug 15	Hon. Paul Knudsen	WITHDRAWN
51-57	Jan 23	CRIMINAL LAW. MOTOR VEHICLES. CARELESS DRIVING.	An information that accused crossed yellow line passing another vehicle in a no-passing zone does not charge the commission of a crime.
51-57	Apr 8	COUNTY COURTS. THIRD CLASS COUNTIES.	Cannot expend county funds for legal advice.
51-57	May 28	COUNTY COURTS. THIRD CLASS COUNTIES. MAY EMPLOY SPECIAL COUNSEL. WHEN.	When third class county court was advised by prosecuting attorney against legal action to evict tenant of county poor farm, and prosecuting attorney refuses to do anything further to protect the county's rights, and the court thereafter employed special counsel, who filed an ejectment suit to evict tenant, said special counsel and not the prosecuting attorney shall have exclusive control of ejectment suit. Courts action was authorized by Section 56.250, RSMo 1949, and it may allow reasonable compensation to special counsel and other compensation paid from available county funds.
52-57	Jan 16	INSURANCE.	Articles of Agreement of Survivors' Benefit Insurance Company.
52-57	Apr 11	ASSESSOR. ASSESSMENTS. TAXATION.	In counties of the third and fourth class having a population of less than forty thousand inhabitants it is discretionary with the assessor as to whether contiguous lots in one ownership are to be assessed as a unit or individually. Further, if in the discretion of the assessor contiguous lots in one ownership are assessed individually, and so entered on the tax books, the assessor would be entitled to a fee of six cents for making each entry.
52-57	Apr 12	INSURANCE.	Articles of Agreement of Metropolitan Universal Life Insurance Company
52-57	Apr 17	ADMINISTRATIVE REVIEW.	In cases which are not "contested cases" under Administrative Review Act, hearings should be granted in some instances.
52-57	May 28	Hon. C. Lawrence Leggett	WITHDRAWN
52-57	May 29	INSURANCE.	Articles of Incorporation of Public Life Insurance Company.
52-57	July 8	INSURANCE.	Articles of Incorporation of the Missouri Union Life Insurance Company.

52-57	July 29	INSURANCE.	Articles of Agreement of Preferred Life and Health Insurance Company.
52-57	Aug 22	INSURANCE.	Articles of Incorporation of the Horace Greeley Life Insurance Company.
52-57	Sept 17	INSURANCE.	Proceedings of board of directors and stockholders of American Universal Life Insurance Company, changing from stipulated premium life insurance company to regular life insurance company are in proper, legal form.
52-57	Sept 18	INSURANCE.	Articles of Incorporation of Home Fidelity Life Insurance Company.
52-57	Sept 19	CORPORATIONS. INSURANCE.	General business corporation formed under Chapter 351 RSMo 1949 may not amend Articles of Incorporation so as to qualify as a joint stock life insurance company subject to provisions of Sections 376.010 to 376.670 RSMo 1949.
52-57	Oct 11	INSURANCE.	Articles of Incorporation of Missouri Life Insurance Company.
52-57	Oct 23	INSURANCE.	Described contract proposed to be issued by ABC Ambulance Company not an insurance contract subject to regulatory provisions of Missouri insurance code.
52-57	Nov 6	INSURANCE.	Articles of Incorporation of State Farmers Mutual Casualty Company.
52-57	Nov 7	INSURANCE.	Articles of Incorporation of Countryside Casualty Company.
52-57	Nov 29	INSURANCE.	Articles of Incorporation of Key Life Insurance Company.
53-57	May 2	TOWNSHIP TAX COLLECTOR. CITY TAX COLLECTOR. COMPATIBILITY OF OFFICES.	The same person may, simultaneously, hold the office of township tax collector and city tax collector in counties having township organization.
53-57	May 23	RECORDS. PUBLIC RECORDS. SCHOOLS.	The public has the right to inspect and copy the contents of the "daily register" required by Section 163.140, RSMo 1949, provided that the exercise of such right does not unduly interrupt the discharge of duties, and the board of education or the superintendent of schools do not have any discretion in permitting or denying such inspection or the right to request a statement of purpose before permitting such inspection.
53-57	Oct 30	CITIES OF THE FOURTH CLASS. CITY TAX COLLECTORS. VACANCIES IN OFFICE.	A special election is required when a vacancy occurs in an elective office in a city of the fourth class more than six months prior to the next general municipal election in such city.

		SPECIAL ELECTIONS.	
57-57	Feb 8	Hon. Oscar Marsh	WITHDRAWN
58-57	May 27	COUNTY COURT. DRAINAGE DISTRICTS. LEVEE DISTRICTS.	County court does not have authority to remove or exclude land that is within a drainage or levee district.
59-57	Jan 9	Hon. Roy W. McGhee, Jr.	WITHDRAWN
59-57	Jan 29	PROBATE LAW. DESCENT AND DISTRIBUTION.	Where nieces and nephews of an intestate inherit from him they will take in their own right per capita in accordance with Section 474.020, RSMo Cum. Supp. 1955.
59-57	May 9	SCHOOL DISTRICTS. TAXATION. PERSONAL PROPERTY.	A property owner who resided in one school district on January 1, 1957, and moved to another school district in the same county prior to the date of assessment, is liable for personal property taxes in the school district in which he resided on the date of actual assessment.
59-57	Nov 18	PUBLIC WORKS. PUBLIC BUILDINGS. PREVAILING WAGE LAW.	A specification of the prevailing hourly rate of wages in the locality for each craft or type of workman needed to execute a state public works contract, including the prevailing rate for legal holiday and overtime work either in the publication of the proposed state improvement or in the plans, specifications and conditions governing the details of the proposed contract, would fully comply with the requirements of House Bill No. 294 enacted by the 69th General Assembly and requiring such specification in the "call for bids."
60-57	Feb 5	COUNTY PROBATION OFFICERS. STATE BOARD OF PROBATION AND PAROLE. PAROLE AND PROBATION OF JUVENILES. JUVENILE COURTS. PAROLES.	The State Board of Probation and Parole is neither under a legal duty nor authorized to accept the supervision of a juvenile placed on probation or parole by a juvenile court.
60-57	Aug 29	INTERSTATE COMPACTS. EXTRADITIONS. PROBATIONERS AND PAROLEES. "STATES" AND "TERRITORIES".	The grant of authority under Sec. 549.310 RSMo 1949, to enter into compacts and agreements with other states for the supervision of parolees and probationers does not include authority by the Governor to enter into such compacts and agreements with Hawaii and Puerto Rico.

60-57	Sept 26	STATE BOARD OF PROBATION AND PAROLE. PAROLEES. THREE-FOURTHS LAW.	Under the provisions of Senate Bill No. 132, 69th General Assembly, time served on a parole counts toward time required to be served in the penitentiary and that, consequently, the three-fourths law (House Bill No. 318, 69th General Assembly) is applicable to inmates paroled by the State Board of Probation and Parole.
62-57	Jan 11	COURT REPORTERS. REPORTERS.	The County Court of Marion County cannot legally pay the circuit court reporters travel expense incurred in traveling from his place of residence in the county to the place of holding circuit court.
62-57	Mar 20	TAXATION. MAXIMUM ANNUAL TAX RATE FOR MUNICIPAL AND SPECIAL PURPOSES BY ALDERMEN. FOURTH CLASS CITIES.	Maximum annual tax rate for general municipal purposes by aldermen of fourth class city without vote of qualified electors authorizing greater rate, is seventy-five cents on one hundred dollars assessed valuation, as provided by Sec. 94.250 RSMo 1949, plus annual tax rate of not exceeding twenty cents on one hundred dollars assessed valuation for any special purpose provided by said Sec. 2, Section 94.260 RSMo 1949. Maximum annual rate for general and special purposes combined to be levied by aldermen is ninety-five cents on one hundred dollars assessed valuation.
62-57	Oct 16	COUNTY HEALTH CENTERS. TAXES.	A county health center tax authorized by the voters before October 31, 1957 can be levied and collected for the year 1957. Power to determine annually the rate of the county health center tax is vested solely in the board of health center trustees.
62-57	Oct 21	WORKMEN'S COMPENSATION. REHABILITATION. APPROPRIATIONS. COMPENSATION. BOARD OF REHABILITATION.	Funds appropriated in Section 4.640 of House Bill No. 204, 69th General Assembly may not be used to pay the sum of \$2,500 each, per annum, to the several members of the Board of Rehabilitation under provisions of Section 287.143.
63-57	Jan 9	Hon. J. Hal Moore	WITHDRAWN
63-57	Mar 27	COUNTY COURTS. CITIES. CITY HOSPITAL. DONATIONS BY COUNTY COURT.	The county court of Howell County may not contribute county funds to the city of West Plains for the purpose of erecting a city hospital in the city of West Plains. Such activity may be done by a joint cooperative basis in accordance with the laws of the State of Missouri.
63-57	Apr 22	SCHOOLS. SCHOOL DISTRICTS. ANNEXATION. BOARD OF EDUCATION.	The annexation of A school district to B school district after an annexation election in A school district must be approved by a majority of the Board of B school district before said annexation can occur. The County Board of education can divide existing school districts for purposes of reorganization under Section 165.685, Cum.

			Supp. 1955.
63-57	Nov 29	SALARIES OF PROSECUTING ATTORNEYS, COUNTY CLERK, COUNTY SUPERINTENDENT OF SCHOOLS, DEPUTY COUNTY CLERK, DEPUTY CIRCUIT CLERK AND REORDER IN FOURTH CLASS COUNTIES WITH POPULATION OF BETWEEN 15,000 AND 17,500.	Prosecuting attorneys in fourth class counties do not receive any salary increase by virtue of any legislation enacted by the 69 th General Assembly; that on and after Aug. 29, 1957, county clerks in fourth class counties are entitled to increased compensation in the sum of \$500 per year; that on and after Aug. 29, 1957, the county superintendent of schools in fourth class counties is entitled to an increase in compensation of \$400 per year; that deputy county clerks in fourth class counties are entitled to \$500 per year additional compensation by virtue of legislation enacted by the 69th General Assembly; that the chief deputy circuit clerk in counties having a population of 15,000 and less than 17,500, shall receive the sum of \$2,280 per year compensation; that the first deputy shall receive the sum of \$2,100 per year; and the second deputy shall receive the sum of \$1,920 per year compensation.
64-57	Feb 1	ELECTIONS. COUNTY OFFICERS. COUNTY JUDGES.	Upon death of an elected county judge before assuming office incumbent does not hold over. An appointed judge holds office until the first Monday next following the first ensuing general election.
64-57	May 2	STATE TREASURER. STATE MONEYS. DEPOSITARY.	Duty of State Treasurer with respect to investment of state moneys not needed for current operating expenses.
64-57	May 21	BLIND PENSION FUND. STATE TREASURER. TRANSFER.	It is the duty of the state treasurer to transfer to the distributive public school fund that portion of the blind pension fund which remained on hand and unappropriated in his custody at the end of the biennium.
65-57	Jan 31	CHILDREN. PLACEMENT. LAWYERS.	A lawyer may perform all of the necessary legal services involved in the transfer of the custody of a child and not be in violation of Section 210.211, RSMo 1949; it is the further opinion of this department that such a lawyer is not in violation of the above section even though he had knowledge that placement had been made by a person not authorized to do so.
65-57	Feb 19	Hon. William G. Myers, Jr.	WITHDRAWN
65-57	Oct 21	LOTTERY.	A contest in which contestants are to complete a statement as to why they prefer the products of a particular dairy, the winner of which contest will be awarded a valuable prize, constitutes the elements of "chance," "prize," and "consideration," and is, therefore, a lottery and contrary to the laws of this state.
66-57	Feb 5	STATE PURCHASING AGENT.	The State Purchasing Agent is not required to secure bids where the articles to be purchased for the state, or any institutions thereof, can

		DEPARTMENT OF CORRECTIONS. DIVISION OF PENAL INSTITUTIONS.	be obtained from the Division of Prison Industries.
66-57	Feb 26	DECEASED CONVICTS. DUTIES OF WARDEN. PROPERTY OF DECEASED CONVICTS. ADMINISTRATION OF ESTATES OF DECEASED CONVICTS.	(1) The Warden of the Penitentiary is not authorized to deliver property of a deceased convict over to the family or relatives of said deceased convict such delivery must be made pursuant to the laws of administration of estates. (2) The venue is to be determined in each particular case as provided in Sec. 473.010, Cum. Supp. 1955.
66-57	Mar 15	Hon. E. V. Nash	WITHDRAWN
66-57	Dec 9	SCHOOLS.	Illegal for school district to pay for transportation of children in vehicles not meeting regulations adopted by State Board of Education, regardless of whether district receives state aid.
68-57	Mar 15	LABOR UNIONS. COUNTY HIGHWAY COMMISSION. COLLECTIVE BARGAINING.	Under provisions of Constitution of 1945, and Revised Statutes of Missouri 1949: (1) Employees of county highway commission may organize a labor union. (2) County court cannot enter into collective bargaining with such union. (3) County court cannot enter contract of employment with such union.
68-57	Mar 20	CORONER'S INQUEST. JURORS.	Each juror attending a coroner's inquest shall receive the sum of \$3.00 per day.
68-57	July 17	DEAD HUMAN BODIES. STATE ANATOMICAL BOARD. DISPOSITION OF.	A dead human body, which is not required to be buried at public expense, does not come within the jurisdiction of the Missouri State Anatomical Board.
68-57	Aug 27	ASSESSORS. DEPUTY ASSESSORS.	In the case of part time deputy county assessors, a portion of whose salary is paid out of the county treasury and a portion by the assessor personally, are county employees and that the county is liable for social security contributions to the extent of the amount of salary which it pays to them; the county is not liable for contributions for unemployment compensation for deputy assessors; and part time deputy assessors would not, to the extent that their salaries are paid by the county, automatically come within the provisions of the Workmen's Compensation Act.
70-57	Apr 8	CRIPPLED CHILDREN. CRIPPLED CHILDREN'S HOSPITAL.	A female person under the age of 21 years, who comes within the compass of Chapter 201, RSMo 1949, and who is eligible to receive hospitalization and medical treatment at the University of Missouri

			under the provisions of the aforesaid chapter, does not lose this eligibility by marriage, provided that her husband is unable to pay the expenses of said hospitalization and medical treatment.
70-57	Dec 12	UNIVERSITY OF MISSOURI. BOARD OF CURATORS. CURATORS OF MISSOURI UNIVERSITY. STATE EMPLOYEES. UNIVERSITY EMPLOYEES. STATE EMPLOYEES' RETIREMENT SYSTEM.	Under the Missouri State Employees' Retirement System Law the Board of Curators of the University of Missouri is not required to make "matching" contributions to the Retirement Fund from the funds of the University.
71-57	June 6	SCHOOLS.	In computing the equalization quota the district in which a pupil resides is entitled to count, for resident attendance, all resident children attending another public school whose tuition the district is required to pay, but that the district is not allowed to count for resident attendance, a resident pupil attending another public school whose tuition the student himself is paying.
71-57	Nov 4	SCHOOLS. EX POST FACTO LAWS. CRIMINAL LAW. CONSTITUTIONAL LAW.	Senate Bill No. 16 of the 69 th General Assembly, which amends the compulsory attendance law, is not ex post facto and is applicable to those children who may have graduated from the eighth grade prior to August 29, 1957, but were under sixteen years of age at that date.
72-57	July 11	BOARD OF TRUSTEES OF COUNTY HOSPITALS. COUNTY COURTS. CONVEYANCE OF COUNTY HOSPITAL PROPERTY.	A board of county hospital trustees may not convey title to hospital property, title to which property is in the county; and further, that the county court of the county may convey title to such property when authorized to do so by the Board of Trustees of the County Hospital.
74-57	June 19	JURORS. FEES.	A juror not on the regular panel and summoned to sit as a juror in any criminal case in which the offense charged is punishable with death or by imprisonment in the penitentiary for life or for not less than a specified number of years and no limit to the time, whether he should have been selected on the panel or not, is to receive the sum of \$6 per day, if he has traveled at least one mile in attending upon the court, and that if he has not traveled at least one mile for

			compensation shall be \$1 per day.
74-57	June 21	SCHOOLS. SCHOOL FUNDS. COUNTY TREASURER.	County treasurer should place 80% of state school moneys received by him for common school district in teachers' fund upon receipt thereof and should place remaining 20% in either incidental or teachers' fund when and as directed by school board.
74-57	Oct 8	SHERIFFS. PEACE AND POLICE OFFICERS. HEALTH OFFICERS.	Who may make application for commitment for temporary confinement and take persons into custody and transfer to hospital under Secs. 202.800 and 202.803, RSMo Cum. Supp. 1955.
75-57	Jan 21	COSTS. CRIMINAL COSTS. CRIMINAL LAW. SAFETY RESPONSIBILITY LAW. MOTOR VEHICLES. DIRECTOR OF REVENUE. OFFICERS.	County liable for costs of prosecution for failure to report accident under Safety Responsibility law if defendant is tried and acquitted, but no costs chargeable if prosecution based upon affidavit of Director of Revenue fails from any other cause.
76-57	Jan 21	LOCKER PLANT. FOOD AND DRUGS. FROZEN FOOD LOCKERS. PROSECUTING ATTORNEY. INJUNCTION. CRIMINAL LAW.	Prosecuting attorney can file criminal charges or institute injunction proceedings against person operating a locker plant without a license as required by law; and prosecuting attorney can institute injunction proceedings against a person who violates any provisions of the locker plant law, including the one requiring an annual license as mentioned above.
77-57	Jan 15	AGRICULTURE. COMMUNITY SALES.	The community sales law and the regulations adopted thereunder do not apply to sales which deal only in horses and not other species of livestock. Community sales and stockyards markets which are subject to the provisions of the Packers and Stockyards Act (7 U.S.C.A. Sec. 181 et seq.) or to the provisions of Chapter 276 RSMo 1949, are by virtue of such state or federal regulation exempted from the provisions of the Missouri Community Sales Law.
77-57	Jan 21	CREDIT UNIONS.	Right to proceeds of insurance upon life of shareholder depends upon term of contract of insurance.
77-57	Dec 4	MISSOURI VETERINARY BOARD. ADMINISTRATIVE AGENCIES. INVESTIGATORS.	Missouri Veterinary Board does not have the power or authority to hire an attorney. All investigations on behalf of said Board must be conducted by the Board itself or any of the members thereof whom the Board may authorize, and said Board does not have the power or authority to hire an investigator.

79-57	Jan 23	PRACTICE OF LAW. TAX DEED. TAX SALE. COLLECTORS.	Collector of taxes of a fourth class county may fill in the blanks of a tax deed; he may not charge for filling in the blanks of a tax deed.
80-57	May 9	CRIMINAL LAW.	The provisions of §560.610, RSMo 1949, as amended by the Laws of 1955, do apply to any person of the age of twenty years or more who pleads guilty to a violation of any of the offenses enumerated in the aforesaid section.
80-57	Nov 18	TAXATION.	The state is not required to pay any part of the expenses incurred under two contracts entered into by and between St. Louis County, Missouri and two appraisal companies to furnish to the county an appraisal of certain designated taxable lands and improvements thereon in said county, together with certain manuals of procedure, field record cards, land value maps, indexing cards, etc.
81-57	Feb 15	STATE BOARD OF TRAINING SCHOOLS. TRAINING SCHOOLS. PURCHASING AGENT.	State Board of Training Schools may convert heating plants of institutions under its control to use of fuel other than coal.
81-57	Sept 30	COUNTY HIGHWAY ENGINEER. COUNTY COURT. SALARY. SENATE BILL NO. 48.	Under Senate Bill No. 48, 69 th General Assembly the maximum salary which a county highway engineer in a third class county may receive during the remaining term of his office is \$3,650.
82-57	Apr 19	OPEN AND CLOSED RANGE. TOWNSHIPS.	The portion of Flatwood Township in Ripley County which became annexed to Johnston Township on September 15, 1952, became open range.
82-57	Aug 5	FIRE PROTECTION DISTRICTS. PROSECUTIONS.	Violations of the ordinances, rules and regulations of the Hickman Mills' Fire Protection District should be prosecuted through the office of the prosecuting attorney of Jackson County.
82-57	Oct 23	SAVINGS AND LOAN ASSOCIATION. INSTALLMENT NOTES. PROVISIONS OF. ILLEGAL WHEN.	Installment promissory note requiring borrowing member of a savings and loan association to pay one dollar per month on his savings account in addition to payments on note as additional security until principal of loan is fully satisfied, violates paragraph 3, Section 369.135, RSMo 1949.
83-57	Sept 6	CRIMINAL LAW. EVIDENCE.	Electro-Matic Radar Speedmeter is a proven scientific technique for measuring the speed of motor vehicles and evidence so obtained constitutes legally admissible evidence which may support a finding of guilt in a criminal cause.
83-57	Sept 30	SCHOOLS.	December 25, 1956, counted as a day in session for the purpose of

		HOLIDAYS.	apportioning state aid to schools.
85-57	Jan 21	Hon. John J. Stegner	WITHDRAWN
85-57	Aug 27	CHILD CUSTODY. JUVENILE COURT.	Section 453.110 RSMo 1949, provides for transfer of custody of child from person, agency, organization or institution having legal custody of said child to any parent, agency or organization or institution for care in a family home without a court order provided the person, agency, organization or institution having legal custody of the child shall retain the right to supervise the care of said child and to resume custody of said child.
85-57	Sept 12	EXECUTIONS. SHERIFFS.	After receiving an order of execution on real property, a sheriff should proceed with the levy and execution. Further, unless otherwise directed, every execution issued from any court of record shall be returnable at the next succeeding term.
86-57	Jan 9	INSURANCE.	Sec. 379.355 RSMo 1949 not violated when cost of municipal franchise tax levied by City of Springfield, Missouri against fire insurance companies has been added to fire insurance rates published for such city by Missouri Inspection Bureau pursuant to Missouri's Rating Act, Secs. 379.315 to 379.415 RSMo 1949.
86-57	Sept 20	MAGISTRATE COURTS. STATUTORY CONSTRUCTION.	Senate Bill 189 abolished the office of chief clerk of the magistrate courts of Greene County, Missouri, and created a vacancy to be filled by the Governor.
88-57	Dec 17	Hon. Franklin T. Thackery	WITHDRAWN
89-57	Jan 30	ANNEXATION. ELECTIONS. CITIES. ELECTION COMMISSIONERS. KANSAS CITY. CONSTITUTIONAL CHARTER CITIES.	Kansas City Board of Election Commissioners may not accept registration records of the Jackson County Board of Election Commissioners applicable to persons within an area annexed to Kansas City; but electors must re-register as provided in Section 82.100, RSMo. 1949.
89-57	Jan 31	Hon. Francis Toohey, Jr.	WITHDRAWN
89-57	Feb 15	CORPORATIONS. FOREIGN. WHEN DOING BUSINESS IN MISSOURI.	Minnesota corporation has no officer, agent or employee in Missouri soliciting business. It solicits business by advertising matter in magazines, newspapers, over radio and television, and by U.S. mail sent from its Minnesota plant. Orders for goods are accepted at plant but filled and shipments to customers are from stock kept in

			warehouse in Missouri, by Missouri warehouse corporation. Latter corporation has no relationship with former except by contract. Former furnishes directions to latter for filling orders and shipping goods to customers, and shipments are not in interstate commerce, but are intrastate, and Minnesota corporation is doing business in Missouri within the meaning of Chapter 351, RSMo 1949, and must procure certificate from secretary of state authorizing it to do business in Missouri as required by Sec. 351.570, RSMo 1949.
89-57	Mar 15	CHANGE OF VENUE. MISDEMEANORS. COSTS.	When a misdemeanor case is filed in one county, is taken on a change of venue to another county where the defendant is acquitted, the county in which the information was originally filed shall be liable for the costs of the proceedings.
89-57	Dec 9	CORPORATIONS.	That portion of Sec. 368.040, RSMo 1949, which relates to special charges in addition to interest rates, is invalid because of its conflict with Sec. 44 of Art. III of the Constitution. A corporation may be incorporated under the provisions of Chapter 368, since the remaining portions of the chapter constitute a workable plan without the invalid portions.
90-57	June 3	DRIVERS LICENSES. APPLICATIONS MAY BE DESTROYED BY DIRECTOR OF REVENUE. WHEN.	Paragraph 3, Section 301.360, RSMo 1949, which provides the Director of Revenue may destroy all applications for drivers licenses after four years, means that each and every application filed by the director in accordance with the provisions of Section 302.120, RSMo 1949, may be destroyed after four years from the date each application was filed.
93-57	June 12	LICENSES. PHARMACISTS.	Construction of Section 338.045, RSMo Cum. Supp. 1955.
93-57	Aug 8	HOUSE BILL NO. 10 69 TH GENERAL ASSEMBLY. FEDERAL HIGHWAY.	The term "federal highway" means only those which are marked as U. S. routes.
95-57	May 2	COUNTY COURTS. COUNTY HOSPITALS. BOND ISSUES.	County court does not possess the authority to call for an election upon a bond issue for the erection of a county hospital; such an election must be by petition of the taxpayers of the county as set forth in Section 108.040, RSMo 1949. When such an election is held and such bond issue is carried that the county court must proceed with the erection of the hospital.
95-57	May 8	COUNTY HOSPITAL BOARD OF TRUSTEES. EMPLOYMENT OF ARCHITECT.	The board of trustees of a county hospital is authorized to employ an architect to draw up the plans and specifications for such a hospital.

95-57	Dec 9	COUNTY CORONERS.	Method and procedure for calling a jury to hold an inquest. If said jury is sworn in they must remain together except when the jury consists of men and women.
96-57	Mar 28 - Amended Sept 9, 1964	SCHOOLS. SCHOOL DISTRICTS.	In making adjustment and apportionment of property and indebtedness on change of boundary lines between school districts, boards of education must take into consideration all factors mentioned in §165.014, RSMo, Cum. Supp. 1955, and may consider other factors if necessary to arrive at just and proper apportionment. Amount awarded by agreement or by arbitration may be paid and enforced as any other valid claim against district.
97-57	Mar 8	SOCIAL SECURITY.	A county which has accepted the provisions of Chapter 105 RSMo Cum. Supp. 1955, extending the benefits of Title 2 of the Social Security Act (42 U.S.C.A. Sec. 401 et seq.) to its employees, is required to pay into the state contribution fund, with respect to wages, amounts at the rates specified in the plan and agreement; and that the county or the proper official thereof can deduct such amounts from wages paid to an elective county official, such as the prosecuting attorney.
98-57	Nov 8	SCHOOLS. PURCHASE OF SURETY BONDS.	Successful bidder on a public works contract has discretion as to a selection of the surety or sureties for a surety bond. School bond cannot require that successful bidder purchase surety bond from a particular agent or broker.
99-57	Jan 4	DISSOLUTION OF BENEVOLENT CORPORATIONS.	The proper method of securing service upon a benevolent corporation which has no place of business and whose officers are all deceased is by publication.
99-57	Jan 28	SPECIAL BENEFIT ASSESSMENT ROAD DISTRICTS. BOUNDARY EXTENSION.	Boundaries of special benefit assessment road districts of non-township organization county cannot be extended by method authorized in Section 233.155, RSMo 1949, for extension of boundaries of special city or town district of non-township organization counties. Dissolution of a special benefit assessment road district of non-township organization county by method authorized in Section 233.290 or Section 233.295, RSMo 1949, followed by the organization of a new enlarged district of the same kind, not effective as means to enlarge boundaries of former district, but effective means for establishing new benefit assessment district with certain proposed boundaries.
99-57	Mar 12	COUNTY COURT. COUNTY PARKS.	The county court of Vernon County, Missouri may appropriate a sum of money, not to exceed five per cent of the county revenue fund, for the erection of a building upon land donated to the county for county park and recreational purposes.

TAXES:
INCOME TAXES:
CORPORATIONS:
CORPORATION INCOME TAXES:
EXEMPTIONS:
TAX EXEMPTIONS:
TAXATION:

Land O'Lakes Creameries Inc., a Minnesota corporation, is liable for taxation on its income under the Missouri Income Tax Law.

February 5, 1957

Honorable T. R. Allen,
Supervisor,
Division of Tax Collection,
Department of Revenue,
Jefferson City, Missouri.



Dear Sir:

This is in answer to your letter of recent date in which you inquire as to whether or not Land O'Lakes Creameries Inc., a Minnesota Cooperative Association, is exempt from the payment of corporate income tax in the State of Missouri under our Income Tax Law.

Section 143.120 RSMo 1949, provides as follows:

"There shall not be taxed under this chapter any income received by any:

- (1) Labor, agricultural or horticultural organizations;
- (2) Mutual savings bank not having a capital stock represented by shares;
- (3) Fraternal-beneficiary society, order or association, operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the payment of life, sick, accident or other benefits to the members of such society, order, or association or their dependents;
- (4) Domestic building and loan association and co-operative banks without capital stock organized and operated for mutual purposes and without profit;
- (5) Cemetery company owned and operated exclusively for the benefit of its members, unless said cemetery is operated for profit;
- (6) Corporation or association organized and operated exclusively for religious, charitable, scien-

tific or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual;

(7) Business league, chamber of commerce or board of trade not organized for profit and no part of the net income of which inures to the benefit of any private stockholder or individual;

(8) Civic league or organization not organized for profit but operated exclusively for the promotion of social welfare;

(9) Club organized and operated exclusively for pleasure, recreation and other non-profitable purposes, no part of the net income of which inures to the benefit of any private stockholder or member;

(10) Farmers' or other mutual hail, cyclone or fire insurance company, mutual ditch or irrigation company, mutual or co-operative telephone company, or like organization, the income of which consists solely of assessments, dues and fees collected from members for the sole purpose of meeting its expenses;

(11) Farmers' fruit growers' or like association, organized and operated as a sales agent for the purpose of marketing the products of its members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of produce furnished by them;

(12) Corporation or association organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this title;

(13) Federal land banks and national farm loan associations, as provided in section 26 of an act of congress approved July 17, 1916, entitled 'An Act to provide capital for agricultural development, to create standard forms of investment based upon farm mortgage, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government depositaries and financial agents for the United States, and for other purposes';

Honorable T. R. Allen

(14) Joint stock land banks as to income derived from bonds or debentures or other joint stock land banks or any federal land bank belonging to such joint stock land bank;

(15) Express companies which now pay an annual tax on their gross receipts in this state and insurance companies which pay an annual tax on their gross premium receipts in this state."

It is our understanding that it is the contention of Land O'Lakes Creameries that such corporation is exempt from the Missouri Income Tax Law because of the provisions of subsection 11 of Section 143.120, supra. It is our view that Land O'Lakes Creameries does not come within the purview of such subsection, and that Land O'Lakes Creameries is, therefore, not exempt from the Income Tax Law of Missouri.

It is to be noted that subsection 11 of Section 143.120 is limited to an association organized and operated as a sales agent for the purpose only of marketing the products of members and turning back to such members the proceeds of the sales of such members, less the necessary selling expenses. Any organization engaged in any other activities than that activity specifically provided for in subsection 11 does not come within the purview of such subsection.

It is provided in the Articles of Incorporation of Land O'Lakes Creameries Inc., in Article II, as follows:

"The purposes for which the association is formed are:

"To engage in any activity in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies;

"* * * It shall have power to handle also such products of nonmembers, but the total of such products handled by it must always be less than the amount delivered by or handled for members."

It appears from the Articles of Incorporation of Land O'Lakes Creameries, therefore, that such organization has the power not only to market the products of its members, but also to manufacture, sell, and supply its members with machinery, equipment and supplies. It further has the power to handle products of nonmembers.

In a letter which you have attached, and which was written to you under date of April 25, 1956, the law firm representing Land O'Lakes Creameries stated that the association does, as a matter of fact, furnish machinery, supplies and equipment.

Honorable T. R. Allen

Since the activities of Land O'Lakes Creameries are not limited to marketing the products of its members, it is obvious that such association is not within the exemption provisions of the Missouri Income Tax Law found in Sec. 143.120. Since the association is not within the exemption statute, it clearly appears that such association is subject to the Income Tax Law of this state.

CONCLUSION

It is the opinion of this office that Land O'Lakes Creameries Inc., a Minnesota Cooperative Association, is subject to the Income Tax Law of Missouri, and cannot qualify as being exempt therefrom.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,

John M. Dalton
Attorney General

CEB/ld

ACCOUNTANCY BOARD: Qualifications for a nonresident to obtain a certifi-
QUALIFICATIONS: cate as a certified public accountant or public
RECIPROCITY: accountant in this state.



February 21, 1957

Missouri State Board of Accountancy
217 State Capitol
Jefferson City, Missouri

Attention: Mr. Francis M. Linek, Member.

Gentlemen:

This will acknowledge receipt of your request for an official opinion which reads:

"The Missouri State Board of Accountancy respectfully requests from your office an opinion construing subsection 3 of section 326.060 of the Revised Statutes of Missouri, particularly with reference to the requirement 'or a public accountant practicing within this state.'

"A hypothetical question concerning this matter is as follows:

"A resident of Kansas City, Kansas, who has an office in Kansas City, Kansas, as a certified public accountant and wishes to obtain a Missouri certificate as a certified public accountant by reciprocity.

"Does the law in your opinion require that this applicant obtain an office in Missouri to practice as a certified public accountant and if said office is required, is the applicant in violation of the law, section 326.020, in obtaining such office."

Section 326.020, RSMo 1949, provides that no person, firm, partnership or corporation shall practice in this state as a certified public accountant or as a public accountant except as provided in Section 326.150, RSMo 1949, provided however, unless he, she or

Missouri State Board of Accountancy

it have been granted a certificate of the Board and secured a permit for the current year. Said section reads:

"1. Nothing in this chapter shall be so construed as to prohibit or prevent the holder of a valid certificate as a certified public accountant or as a registered public accountant granted by another state, from performing within this state a particular contract of employment as public accountant, entered into in such other state, and involving or requiring a merely temporary activity as public accountant in this state.

"2. Nothing contained in this chapter shall prohibit or prevent the employment by a certified public accountant or by a public accountant or by a firm or partnership or corporation furnishing public accountancy services as principal of non-registered persons not otherwise qualified under this chapter to serve as accountants in various capacities as needed; provided, that such persons work under the control and supervision of a person who holds a permit for the current year; and provided further, that such employees do not issue statements or reports over their own names, except such interoffice reports as are necessary and customary; and provided further, that such persons are not in any manner held out to the public as public accountants as described in section 326.010.

"3. Nothing contained in this chapter shall imply that a practicing attorney, who, in connection with this professional work, prepares financial reports or presents accounting records of a form or character usually prepared and presented by attorneys, has become a public accountant within the meaning of this chapter as described in section 326.010."

We are assuming for the sake of this opinion that said applicant does not merely desire to perform in this state some specific contract of employment as a public accountant, entered in such other state and involving or requiring merely temporary activity as a public accountant in this state, as provided in the exception hereinabove found in subsection 1 of Section 326.150, supra.

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The Accountancy Law in this state does contain a reciprocal provision namely Section 326.090, RSMo 1949, which permits the Board to waive and dispense with the requirement of examination and issue a certificate as a certified public accountant to any applicant holding a valid and unrevoked certificate as a certified public accountant issued by or under the authority of another state provided said applicant has complied with other qualifications and requirements of applicants under this chapter and rules of the Board, and that his original certificate in the other state was secured as a result of an examination equivalent in the judgment of the Board to those in this state.

Qualifications of an applicant now under Chapter 326 are found in Section 326.060, RSMo Cum. Supp. 1955, and are that he must be a citizen of the United States, over the age of 21 years, and must also have one of the following three requirements: (1) be a resident of this state; (2) or have an office in this state for the regular practice of accountancy; (3) or be an employee of a certified public accountant or a public accountant practicing within this state.

It is apparent that said applicant is a citizen of the United States and over 21 years of age. However, he is not a resident of Missouri and presently does not have an office in Missouri for the regular practice of accountancy and, furthermore, he is not an employee of a certified public accountant or a public accountant practicing within this state.

Therefore, assuming that said applicant does meet the requirements of Section 326.090, supra, in that he holds a valid certificate from another state, and assuming he likewise took an examination in order to obtain his original certificate in said foreign state which was equivalent in the judgment of the Board to those of this state, he still cannot obtain a certificate in Missouri until he can at least meet one of the requirements set forth in the preceding statute namely subsection 3 of Section 326.060, supra.

There does seem to be some ambiguity between Sections 326.020, RSMo 1949, and 326.060, subsection 3, supra, particularly relating to said applicant having an office in Missouri for the regular practice of public accountancy, as under our Accountancy Law he could not have such an office in this state and practice accountancy without being duly licensed by your Board.

There is a well-established rule of statutory construction that all sections of a statute and acts in pari materia, and all parts thereof, are to be construed together and compared with each other and no one act or portion of another is to be singled out for consideration apart from all other portions. *Fleming vs. Moore Bros. Realty Co.* 251 S.W. 2d. 8.

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The only reasonable way to reconcile these two statutes and we believe it was apparently the legislative intent in enacting same, that if said applicant can qualify for said license without an examination provided he had such an office in this state as required under Section 326.060, subsection 3, supra, that your Board may authorize the issuance of said license subject to said applicant opening such an office in this state prior to the issuance of said license.

CONCLUSION

It is, therefore, the opinion of this department that said Board may issue said applicant a license, assuming that he is now the holder of a valid and unrevoked certificate from another state as a result of an examination equivalent to those given in this state by your Board, and that he have or open an office in this state for the regular practice of accountancy prior to the Board issuing him a license as provided in Section 326.060, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

ARH:mw

John M. Dalton
Attorney General

FICTITIOUS NAME:
SECRETARY OF STATE:

Proprietors are not required to register when operating under their name with such words as "company" or "and company" or words descriptive of the character of business are added thereto.



April 24, 1957

Missouri State Board of Accountancy
270 State Capitol Building
Box 613
Jefferson City, Missouri

Attention: Mr. J. T. Patmore, Secretary.

Gentlemen:

This will acknowledge receipt of your request for an official opinion which, in part, reads:

"We have assumed that the name of a sole proprietorship which includes the proprietor's name and the words 'Company' or 'and Company' probably do not require registration under the fictitious name statute. Will you please advise whether the State Board of Accountancy is justified in making this assumption.

"In this connection, we would also appreciate advice regarding the requirements for registration under the fictitious name statute of partnerships or proprietorships when the firm name contains, in addition to the owners' names, the words 'Accounting Service', 'Audit Company' or similar terms which indicate the type of business carried on by the firm."

The law in this state requiring registration of a person doing business under a fictitious name is very brief and contains only four sections, namely Sections 417.200, 417.210, 417.220 and 417.230, RSMo 1949. The latter two sections relate to the fee for doing business in this state and the penalty therefor in not registering. Section 417.200, supra, reads in part:

"That every name under which any person shall do or transact any business in this state, other than the true name of such person, is hereby declared to be a fictitious name, and it shall

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be unlawful for any person to engage in or transact any business in this state under a fictitious name without first registering same with the secretary of state as herein required."

The foregoing provision clearly refers to a person in the singular and does not go so far as to include therein any person or persons, etc. Likewise, Section 417.210, supra, again requires every person who shall engage in business in this state under a fictitious name or any name other than the true name of such person to register by verified statement of all parties concerned, all of which refers to every person, and reads, in part:

"Every person who shall engage in business in this state under a fictitious name or under any name other than the true name of such person shall, within five days after the beginning or engaging in business under such fictitious name, register by verified statement of all parties concerned, upon blanks furnished by the secretary of state,
* * * * *

Speaking of fictitious name statutes, we find in Volume 65, C.J.S. Section 9, page 12, 13, a very clear explanation of the purpose for such statutes and it reads, in part:

"* * * * *They declare a public policy of the state, and have been held prohibitory and not for revenue, even though a filing fee is prescribed. They are intended for the protection of those engaged in commercial transaction relating to the business conducted under an assumed or fictitious name. Their purpose is to protect those dealing with a person or firm doing business under such a name, in order to enable them to know with whom they deal or do business, and, where they provide a penalty, to punish those who violate the act. The primary purpose of such a statute is not to prevent the transaction of business, or to produce a confiscation of property or relieve debtors from their honest obligations; nor are they intended to confer rights or advantages on a person or firm failing to comply with their requirements.* * * *

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"Compliance with such a statute by a person doing business under an assumed or fictitious name gives constructive notice to others dealing with him of the nature of the person or business being dealt with and with whom they deal, and they cannot plead ignorance of such facts.* * *"

Let us consider your first question as to whether or not a sole proprietorship, which includes the proprietor's name and such words added thereto as "company" or "and company," is required to register under the fictitious name statute.

In *Tate v. Atlanta Oak Flooring Co. et al.*, 18 S.E.(2d) 903, 1.c. 905, we find a decision rendered by the Supreme Court of Virginia construing a similar fictitious name statute as will be found in this state. That decision holds that a sole proprietor may operate under a firm name consisting of his own name with additional words "lumber company" without registering under the fictitious name statute for the reason that such additional words are merely descriptive of the character of the business. In so holding the court said at 1.c. 905:

"In this case, the sole owner or proprietor of the plaintiff is A. E. Tate. Certainly the trade name, 'A. E. Tate Lumber Company', sufficiently discloses the true name of the individual transacting the business. Adding the words 'Lumber Company' does not take from this conception of the meaning of the trade name. They are simply descriptive of the character of its business and constitute additional and important information to the public. Under the most meticulous view of the thing not even a semblance of fraud or deceit can be seen. Nor is there anything fictitious or unreal about it. The name, without assumption of any sort, reveals the identity of the individual transacting the business and discloses its nature. This being so, the statute, which has its basis upon the conduct of business in this state under an assumed or fictitious name, cannot have any application to the situation in this case.

"In a valuable note appended to the case of *Kusnetzky v. Security Insurance Co.*, 313 Mo. 143, 281 S.W. 47, 45 A.L.R. 189, 262, the annotator makes this note:

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"The designation "George W. Merrill Automobile Company," under which a person by this name alone conducted the business of keeping automobiles for hire, was held in Merrill v. Caro Investment Co., 1912, 70 Wash. 482, 127 P. 122, to disclose the full, true and real name of the owner, who was, therefore, not within the provision of the Washington statute that no persons should transact business under an assumed name or under a designation, name, or style other than the true and real name or names of the person or persons conducting the business, without filing a certificate."

See also Patterson et al. vs. Byers, 89 Pac. 1114, 1115, 17 Okla. 633, 10 Am. Cas. 810; Carlock et al. vs. Cagnacci, 26 Pac. 597, 88 Calif. 600 and Mangan v. Schuykill Co. 116 Atl. 920.

In view of the foregoing, we believe that any sole proprietor may operate a business under his name with such words added as "company" or "and company" or even such additional words added which might indicate the character of the business.

Relative to your second request, we are enclosing a copy of an opinion rendered to Honorable Thomas M. Keyes, President of the State Board of Accountancy, under date of September 23, 1953, to which you referred in your request. We believe this opinion answers the second part of your request.

On page 3 thereof it reads: "The inclusion of the words 'and company' in a partnership name, so long as the true names of the partners are included, probably does not necessitate the registration of such name with the Secretary of State as a fictitious name under Section 417.200, supra, although there is no authority on the point in Missouri and the cases in other states are divided. See 65 C.J.S., Names, Sec. 9, N. 51."

CONCLUSION

It is the opinion of this Department that any sole proprietor may operate a business under his name with such words added thereto as "company" or "and company" or by even adding thereto descriptive words showing the character of the business without the necessity of registering under the fictitious name statute.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

Enclosure(1)

ARH:mw

TAXATION:
INCOME TAX:
DIRECTOR OF REVENUE:
TAXES:
TAX RETURNS:

When no income tax return is filed, director of revenue has four years from date on which taxpayer is required by law to file return to make assessment. Director of Revenue has four years from date return was actually filed to make additional assessments.

June 12, 1957

Honorable T. R. Allen
Supervisor, Income Tax
Department of Revenue
Jefferson City, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting official opinion of this department and reading as follows:

"This Department desires an official opinion with regard to Section 143.240 as it affects Statute of Limitation as referred to therein, and for the purpose of our request, we quote Section 143.240 in its entirety:

"'Estimate of income, when made--examination of books--credit slip--additional assessment--administration of oaths.--In case any taxpayer shall fail to make return as required by law, the director of revenue shall have authority to estimate the amount of such taxpayer's income, from such sources as he may be able to obtain including the business, records and books of any taxpayer, which business, records and books, the director of revenue is hereby given the right to examine during the usual business hours at any time within four years after the return of such taxpayer is required by law to be filed, and the director of revenue shall thereupon make the assessment including all penalties and interest provided. At any time within four years after any return shall have been filed the director of revenue shall have the right to examine, during the usual business hours, the business, records and books of any individual, corporation, joint stock company, joint stock association or partnership, and to make refund or issue a credit to any taxpayer at the taxpayer's election, if more tax has been paid than legally due, which credit shall be taken as deduction of the succeeding tax

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or taxes based on incomes to the extent of such credit. The director of revenue may determine any deficiency not returned by the taxpayer, and shall make an additional assessment including all penalties and interest provided; provided in case of overpayment of tax, the taxpayer shall not be precluded from any other remedy now or hereafter available. The director of revenue and his deputies shall have power to take and administer all oaths specifically required under any provisions relating to taxes based on incomes. Wherever the term "director" or "director of revenue" is used pertaining to the assessment, levy, collection or payment of taxes based on incomes it shall mean director of revenue or his deputies duly authorized by him. All claims for adjustment or refund shall be made in such form as the director of revenue by regulation shall prescribe.'

"It will be noted that it is apparent under the phraseology with respect to a taxpayer who fails to file a return and the time prescribed under which the Director of Revenue may examine the return as filed by taxpayer for the purpose of issuing credits or making additional assessments. Particular attention is called to that portion of the section providing the statutory limitations in case any taxpayer shall fail to make a return as required by law, in which it is stated that the Director of Revenue is given the right to examine during the usual business hours at any time within four years after the return of such taxpayer is required by law to be filed. Immediately following is the provision that any time within four years after any return shall have been filed, the Director of Revenue shall have the right to examine during the usual business hours the business records and books of any individual, corporation, joint stock company, joint stock association or partnership to make refund or render additional assessments.

"For the purpose of clarifying this request, is it to be construed that in the first instance, in the case of the failure of the taxpayer to file a return, the four years expires at any time within four years after the return of such a taxpayer is required to be filed?

"In the second instance, if, for example, a taxpayer might file his return on the 15th day of March and the statutory period for filing would be March 31 or April 15, as the case might be, would the four years statute

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run from the date the return was actually filed, or the statutory final due date?

"Further, in case taxpayer requests an extension of time and such extension is granted and taxpayer would file his return under the extension 90 days after the statutory filing period, from what date would the four-year statute for adjustment run?"

It is our view that under the provisions of Section 143.240, Cum. Supp. 1955, which you have quoted in your opinion request, the Director of Revenue is authorized, when no income tax return is filed, to estimate the amount of the taxpayer's income and to make the assessment of such income at any time within four years after the date when the return of such taxpayer is required by law to be filed, and the director is authorized, when a return has been filed, to make an additional assessment at any time within four years after the return has actually been filed, whether such return has been filed pursuant to an extension granted by the Director of Revenue or otherwise.

In the case of State v. Rogers, 172 SW2d 940, the Supreme Court of Missouri had before it the question of assessment of income taxes for prior years when no income tax returns had been filed for such years. It is true that in that case the court held as follows, l.c. 942:

"We hold that the County Assessor has no authority to assess an additional income tax or an income tax where the taxpayer failed to file a return unless the auditor's estimate is certified to him within three years after the income tax was due.* * *"

However, since the court was actually passing only on the question of assessment of income taxes when no return had been filed, it is our view that such holding of the court is applicable only insofar as assessment is concerned, when no return has been filed for the year in question. Under such holding, therefore, we believe it to be clear that where no income tax return is filed, the Director of Revenue has four years from the date when such return is required by law to be filed to estimate the amount of such taxpayer's income and make the assessment.

However, it is to be noted that in the Rogers case, the court quoted approvingly from the case of State ex rel. v. Gehner, 27 SW2d 1, decided by the Supreme Court of Missouri en banc, as follows, 172 SW2d l.c. 942:

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"* * * By laws of 1929, § 13123, p. 420, it is provided that, at any time within three years after any income tax return has been filed, the state auditor may certify to the assessor any deficiency therein determined by him, and thereupon the assessor shall make an additional assessment in accordance with such certificate.* * *" (Emphasis added)

Under such holding by the court en banc in the Gehner case, it is clear that the provision of the 1929 law providing "shall have been filed", which is the same phrase as is found in the second sentence of Section 143.240 Cum. Supp. 1955, meant "has been filed". Therefore, it is our view that where an income tax return has been filed the Director of Revenue may determine any deficiency not returned by the taxpayer and make an additional assessment at any time within four years after the actual filing of such return, whether such return was filed pursuant to an extension granted by the Director of Revenue or otherwise.

CONCLUSION

It is the opinion of this department that when any taxpayer fails to make an income tax return, the Director of Revenue has authority to estimate such taxpayer's income and make the assessment of such income at any time within four years after the date when the return of such taxpayer is required by law to be filed.

It is the further opinion of this office that when an income tax return has been filed, the Director of Revenue may determine any deficiency not returned by the taxpayer and make an additional assessment at any time within four years after such return was actually filed, whether filed pursuant to an extension granted by the Director of Revenue or otherwise.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,

John M. Dalton
Attorney General

CEB/ld

ECONOMIC POISONS:
DEPARTMENT OF
AGRICULTURE:

Products for eliminating internal worms from hogs, poultry, or other animals are not subject to registration under the Missouri Economic Poisons Act. All 100% paradichlorobenzine or 100% naphthalene products of a company, all of which bear the same or a portion of the same claims, can be registered as one economic poison under the Missouri Economic Poisons Act, and only one registration fee has to be paid thereon.



January 29, 1957

Mr. Julius R. Anderson
State Entomologist
Department of Agriculture
Jefferson City, Missouri

Dear Mr. Anderson:

This is in answer to your opinion request to this office dated October 30, 1956, and reads as follows:

"We would like to have an opinion in regard to two subjects being registered under the Missouri Economic Poisons Law. (Section 263.270-263.380).

"1. Should products used for eliminating internal worms from hogs, poultry or other animals be included under Economic Poison registrations? These worms are not insects as defined under Section 263.270 (7).

"2. Should products containing 100% paradichlorobenzine or 100% naphthalene (generally used for clothes moth control) when sold by a company in various shapes and forms and names be allowed to be registered as one product and subject to only one fee, ie all 100% paradichlorobenzine products of a company as one registration and all 100% naphthalene products of that company as one registration?"

I.

The worms referred to in the first question in your opinion request are called nematodes and are defined by Webster's Unabridged dictionary, Second Edition, as a class of worms of the phylum nemathelminthes and sometimes called nemas.

Section 263.270, paragraph 1, Cum. Supp. 1955, which defines an economic poison, reads as follows:

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"(1) The term 'economic poison' means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects, rodents, fungi, weeds, or other forms of plant or animal life or viruses, except viruses on or in living man or other animals, which the commissioner, after a hearing, shall declare to be a pest;"

Nematodes are not rodents, nor are they a form of fungi or weed, and as stated in your opinion request, neither are they insects within the definition stated in Section 263.270, paragraph 7, Cum. Supp. 1955. Also, they are not a form of animal or plant life which the commissioner, after a hearing, has declared to be a pest.

The Federal Government, in construing its own economic poison act in the Code of Federal Regulations, Title 7, Agriculture, Chapter 3, at Section 362.101, paragraph (g), stated that:

"The following products concerning which questions have been raised are not economic poisons within the meaning of the act:

* * * * *

"(7) Preparations intended for nemas * * *."

Therefore, it is the opinion of this office that products used for eliminating internal worms, commonly called nematodes, from hogs, poultry or other animals, need not be registered under the Missouri Economic Poisons Act, as such products are not economic poisons within the definition of an economic poison stated in Section 263.270, paragraph 1, supra.

II.

As for your second question, with regard to the registration of several products under one economic poison registration when the products all contain 100% paradichlorobenzene or 100% naphthalene, although sold in separate shapes and forms and under several brand names, we find that the registration of economic poisons is provided for under Section 263.300, Cum. Supp. 1955, paragraph 1 of which reads as follows:

"(1) * * * provided that products which have the same formula, are manufactured by the same person, the labeling of which contains the same or a portion of the same

Mr. Julius R. Anderson

claims, and if information concerning such products is previously given to the commissioner identifying the product as the same economic poison, such products may be registered as a single economic poison; and additional names and labels shall be added by supplement statements during the current period of registration."

Under this section, in order to have one economic poison registration cover several products: (1) the products must have the same formula; (2) the products must be manufactured by the same person; (3) the labeling of the products must contain the same or a portion of the same claims; and (4) information concerning such products must have been previously given to the Commissioner identifying the products as the same economic poison.

As for the first requirement for multiple registration and the registration of products containing 100% paradichlorobenzine or 100% naphthalene as one economic poison, we find, from the labels that you have given us, that all the products are either composed of 100% paradichlorobenzine or 100% naphthalene, with the exception of the "Scram Rose Moth Cakes" and the "Zorex Moth Killer," which are 99 1/2% naphthalene and 1/2% perfume. All of the other products composed of 100% paradichlorobenzine or 100% naphthalene can be registered as one economic poison, but the last two products cannot be included with the other products since they do not have the same formula. Since each of them have the same formula, they may be registered together as one economic poison, but they may not be registered with the other products which are 100% naphthalene.

As to the second requirement for multiple registration, all the products of 100% paradichlorobenzine or 100% naphthalene are manufactured by the same person, the Fred J. Curran Co., Downers Grove, Illinois.

As to the third requirement, the labels of the products composed of 100% paradichlorobenzine or 100% naphthalene all contain the same or a portion of the same claims, the basic claim of which is the killing of moths.

As to the fourth requirement, information concerning such products has been previously given to the commissioner identifying the products as one economic poison.

From comparing the facts which you have presented us with to the requirements of the statute for multiple registration of products as one economic poison, we find that all products of 100%

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paradichlorobenzine or 100% naphthalene, which are manufactured by the same person, the labeling of which contains the same or a portion of the same claims, and concerning which certain information has been presented to the commissioner, can be registered as one economic poison and is thereby subject only to one registration fee. The names under or the forms or shapes in which the products are sold have no effect on their registration as one economic poison.

CONCLUSION

It is the opinion of this office that products for eliminating internal worms from hogs, poultry, or other animals are not subject to registration under the Missouri Economic Poison Act.

It is also the opinion of this office that all 100% paradichlorobenzine or 100% naphthalene products of a company, all of which bear the same or a portion of the same claims, can be registered as one economic poison under the Missouri Economic Poisons Act, and only one registration fee has to be paid thereon.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard W. Dahms.

Yours very truly,

JOHN M. DALTON
Attorney General

RWD/b1

DEPARTMENT OF AGRICULTURE: Paints resistant to mildew on the paint
ECONOMIC POISONS LAW: film only are not economic poisons with-
in the meaning of the Missouri Economic
Poisons Law.



February 1, 1957

Mr. Julius R. Anderson
State Entomologist
Department of Agriculture
Jefferson City, Missouri

Dear Mr. Anderson:

This is in answer to your opinion request to this office dated November 5, 1956, and reads as follows:

"The question has arisen several times as to whether or not paints containing a fungicide need to be registered under the Missouri Economic Poisons Law.

"Enclosed is a letter and a set of labels from the Devoe & Reynolds Company which is a typical sample of such paints. We would appreciate an official opinion as to these paints with fungicides being considered as economic poisons under the Missouri Economic Poisons Law."

This office finds that in the Department of Agriculture's amendment to regulations for Missouri's Economic Poisons Act of 1955, under the heading interpretation with respect to substances included in the definition of economic poison under the Missouri Economic Poisons Law, there is included this paragraph:

"* * * Some specific examples of products which will not be considered economic poisons within the meaning of the act are:

* * * * *

"4. preparations intended to prevent fouling of ships bottoms by barnacles or other marine animals."

It is the opinion of this office that paints which are highly resistant to the occurrence of mildew on the paint film only are in the same category with the anti-fouling compounds declared by the Department of Agriculture in the above regulation as not economic poisons, and that under the above regulations, as adopted

Mr. Julius R. Anderson

by the Department of Agriculture, such a paint is not an economic poison within the meaning of the Missouri Economic Poisons Law.

CONCLUSION

It is therefore the opinion of this office that a paint which is highly resistant to the occurrence of mildew on the paint film only is not an economic poison within the meaning of the Missouri Economic Poisons Law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard W. Dahms.

Yours very truly,

JOHN M. DALTON
Attorney General

RWD/b1

SHERIFFS:
FEES AND MILEAGE:

Where, by order of court, the sheriff of Christian County went to St. Louis, Missouri, and transported a witness in a criminal case to Christian County, sheriff cannot be compensated for so doing.



Where, by order of the circuit court, the sheriff of Christian County, went to the Missouri State Penitentiary in Jefferson City, secured therefrom a prisoner and transported him to Christian County to serve as a witness in a criminal case, after which the sheriff transported such witness back to the Missouri State Penitentiary, sheriff cannot be compensated for such service.

June 12, 1957

Honorable Sam Appleby
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"In a recent murder case (Arthur Clark) tried three times in Christian County, which came here on a change of venue from Taney County heavy costs have been incurred and two question concerning Sheriffs' fees and mileage have developed of which I do not find a clear answer in our statute.

"The first problem is:

"The Sheriff of Christian County, by order of the Circuit Court of Christian County, was ordered to transport both ways a minor child from a childrens' home in St. Louis as a material witness and did transport the child several round trips (the child was the child of the person accused of murder and has previously been declared a ward of the juvenile court of Taney County by that Court and placed in St. Louis.)

"The Question is:

"May the Sheriff be paid for his services by the State of Missouri? If not, then is Taney County (original venue county) liable for the costs?

Honorable Sam Appleby

"The second problem is:

"In an order granting Writ of Habeas Corpus ad testificandum wherein the witness is a prisoner in the Missouri Penitentiary, the Sheriff of Christian County, under said order did deliver said witness (prisoner) to court as material witness in a murder case is the Sheriff entitled to his fee and mileage payable by the state of Missouri? If not is the County of original venue responsible for the costs."

We shall consider both your first and second questions together, since we believe they both are to be answered in the negative and that reason for answering them in the negative is the same in both instances, to wit, that there is no statutory provision for a sheriff to be paid for his services in either of the instances which you set forth.

The fees of sheriffs in criminal cases may be found in Section 57.290, RSMo 1949, which section was amended by the laws of 1953, page 386, section 1.

As we stated, we find nothing in that section to cover either of the situations which you set forth.

Section 57.300, RSMo 1949, reads:

"Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten Cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held; provided, that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

At first sight it might appear that the above section would embrace the situation which you present, but we feel that it must be read in connection with Section 491.090, RSMo 1949, which reads:

"In all cases where witnesses are required to attend the trial in any cause in any court of record, a summons shall be issued by the clerk

Honorable Sam Appleby

of the court wherein the matter is pending, or by some notary public of the county wherein such trial shall be had, stating the day and place when and where the witnesses are to appear."

And also Section 491.110, RSmo 1949, which reads:

"Subpoenas shall be directed to the person to be summoned to testify, and may be served by the sheriff, coroner, marshal or any constable in the county in which the witnesses to be summoned reside or may be found, or by any disinterested person who would be a competent witness in the cause, and the sheriff, coroner, marshal or constable of any county may serve any subpoena issued out of any court of record of their county, in term time, in any county adjoining that in which the court is being held."

In connection with the above, it would appear to us that under the circumstances no authority exists for paying the sheriff.

In the second situation, wherein the witness is a prisoner in the Missouri penitentiary, we find no authority vested in the sheriff of Christian County to go to the Missouri penitentiary and bring the prisoner to Christian County to serve as a witness. We might also note that we find no authority vested in the warden of the Missouri state penitentiary to release a prisoner in his custody under such circumstances.

In this regard we direct attention to the case of Maxwell v. Andrew County, 146 S.W. 2d 621, which, at l.c. 625 states:

"It is well established law that the right of a public officer to be compensated by salary or fees for the performance of duties imposed on him by law does not rest upon any theory of contract, express or implied, but is purely a creature of the statute. Gammon v. Lafayette County, 76 Mo. 675; State ex rel Evans v. Gordon, 245 Mo. 12, 149 S.W. 638; Sanderson v. Pike County, 195 Mo. 598, 93 S.W. 942; Jackson County v. Stone, 168 Mo. 577, 68 S.W. 926; State ex rel Troll v. Brown, 146 Mo. 401, 47 S.W. 504; Bates v. City of St. Louis, 153 Mo. 18, 54 S.W. 439,

Honorable Sam Appleby

77 Am. State Rep. 701; Williams v.
Chariton County, 85 Mo. 645.* * *

We construe the above excerpt from the Maxwell case to mean that before the sheriff of Christian County can be compensated for his services in either of the situations set forth by you, that he must be able to point to a statute which would entitle him to be so compensated. Since we are unable to find any such statute and do not, in fact, believe that any such statute exists, we do believe that the sheriff cannot be compensated for his services in these two situations.

In regard to the writ of habeas corpus ad testificandum, we note that this writ is properly directed to the custodian of the witness rather than to the sheriff, and requires the custodian to have the witness in court at the time of the trial in order that such witness may give his testimony.

In reference to this matter the Missouri Supreme Court en banc, in the case of State v. Ryan, 38 S.W. 2d 717, at l.c. 717 stated:

"The warden questions the authority of the circuit court to issue the writ. Circuit courts have jurisdiction over criminal cases. Section 22, art. 6, Const. They are authorized by the Constitution to try such cases. They cannot do so without witnesses. Authority to compel the attendance or production of witnesses is an element of jurisdiction. It is essential to the existence of said courts and to the due administration of justice. 15 C.J. 752. Without such authority, there is no jurisdiction. In other words, said courts have the inherent power to compel the attendance or production of witnesses. Having such power, they are authorized to issue process, 'according to the principles and usages of law,' for that purpose. Yeoman v. Younger, 83 Mo. 424, loc. cit. 429. Furthermore, by statute, declaratory of the common law, 'all courts shall have power to issue all writs which may be necessary in the exercise of their respective jurisdictions, according to the

Honorable Sam Appleby

principles and usages of law.' Section 1844, Rev. St. 1929. The writ under consideration is of ancient origin, and has been available at all times to compel the custodian to produce a prisoner in court to give testimony. We have no doubt of the full and complete authority of the circuit court of the city of St. Louis to issue the writ. Having such authority, said court is authorized to compel the warden to obey the writ. However, it must be understood that the writ is grantable in the discretion of the court. Abuse of the process should not be permitted. On the hearing of the petition for the writ, the court should require strict proof of the materiality of the testimony and the necessity of the attendance of the prisoner as a witness. If it appears that the application is in good faith and the testimony is material and important, the petition for the writ should be granted."

In further reference to this matter we note in 70 C.J., Section 54, page 64, the following:

"Where a person whose attendance as a witness is desired is lawfully restrained of his liberty, as where he is in prison, or in an insane asylum, his attendance is secured by means of a writ of habeas corpus ad testificandum, which is directed to the custodian of the witness, and requires him to have the body of the witness in the court at the time of the trial in order that such witness may give his testimony. Such writ is available where a person under detention wishes to testify for himself, as well as where his testimony is desired by another, and except as otherwise provided by statute, where he is serving a sentence as well as where he is awaiting trial. The power to issue such process is inherent in the courts, and in some jurisdictions is confirmed, but in others superseded, by statute."

Honorable Sam Appleby

CONCLUSION

It is the opinion of this department that where, by order of court, the sheriff of Christian County went to St. Louis, Missouri, and transported a witness in a criminal case to Christian County that the sheriff cannot be compensated for so doing.

It is the further opinion of this department that where the sheriff of Christian County, by order of the circuit court, went to the Missouri State Penitentiary in Jefferson City, secured therefrom a prisoner and transported him to Christian County to serve as a witness in a criminal case, after which the sheriff transported such witness back to the Missouri State Penitentiary, that the sheriff cannot be compensated for such service.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW:lc:db

COUNTY ASSESSOR:
CONTRACT WITH COUNTY:

A county assessor in a fourth class county may bid on work which consists of making a fill in a county road, which contract will be let by the county court to the lowest acceptable bidder.



December 10, 1957

Honorable Sam Appleby
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I respectfully request your Office to furnish me an opinion on the following question:

"Is it lawful for our County Assessor duly elected, to accept employment for repair of a bridge from our County Court?

"More in detail, the facts are, that our present newly elected County Assessor has for several years been engaged in the Bulldozing and Road Construction business, and he and one other operator in this County do the bulk of the Bulldozing business. Recently a bridge is in need of fill to prevent washing out and the County Court desires to allow the County Assessor to bid on this job, if there is no law preventing such action, or preventing them granting him the contract, assuming that he might be acceptable.

"I have attempted to briefly, and hurriedly, check the law, and I find that such is definitely prohibited in first class counties by virtue of Section 61.130 MoRS 1949, and further find that what would be a comparable statute relating to classes 2, 3, and 4, our County being a 4th class one, is Section 61.300 MoRS 1949, which makes no mention of the County Assessor, or does it have a catch-all including all County Officers."

Honorable Sam Appleby

All references to statutes will be to Revised Statutes of Missouri 1949, unless otherwise indicated.

Section 61.130 reads:

"No officer or employee of the state or county, or of any road district, shall be pecuniarily interested in any sale, bid or contract for the purchase of any machinery, materials or equipment, or for the building, improvement, repair or maintenance of any highway, road, bridge or culvert in the county. Any person who shall willfully violate the provisions of this section shall be deemed to be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than five hundred dollars or by removal from office, or both."

The above section is applicable only to class one counties. As will be noted, it holds that no county officer or employee shall be allowed to do what is contemplated by you. However, Christian is a fourth class county and Section 61.300 is applicable to counties of classes two, three and four. That section reads:

"No county highway engineer, county surveyor or deputy county highway engineer, or deputy county surveyor or road overseer shall be the sales agent, for compensation in the sale to, or purchase by, the state, county or road districts of road tools, culvert or bridge material or machinery, or be pecuniarily interested in any contract for the building of any bridge or culvert or for the improvement of any public road to which the county or any road district is a party."

It will be noted that under this section there is no prohibition against a county assessor taking a contract to do road work such as is contemplated in your opinion request.

Section 49.140 further defines the prohibition regarding certain county officers taking contracts for county work, and reads:

"No judge of any county court in this state shall, directly or indirectly, become a party to any contract to which such county is a party, or to act as any

Honorable Sam Appleby

road or bridge commissioner, either general or special, or keeper of any poor person, or to act as director in any railroad company in which such county or any township, part of a township, city or incorporated town or village therein is a stockholder, or to act as agent for the subscription of any stock voted to any railroad by any county or subdivision thereof."

Section 229.090, RSMo 1949, further limits the contractual power of certain county officers, and reads:

"No member of a highway board or county court, and no highway engineer or road overseer shall be the sales agent in the sale to, or purchase by, the state, county or road districts, of road tools, culvert or bridge materials or machinery, or be pecuniarily interested in any contract for the building of any bridge or culvert or for the improvement of any public road to which the county or any road district is a party."

Since the legislature designated certain county officers whom it prohibited from contracting with the county, we feel that those who were not thus prohibited by the legislature may so contract. Since county assessors in fourth class counties were not thus designated as being ineligible to contract with the county, we believe that they may do so.

CONCLUSION

It is the opinion of this department that a county assessor in a fourth class county may bid on work which consists of making a fill in a county road, which contract will be let by the county court to the lowest acceptable bidder.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW/lc/ld

OFFICERS: STATE OFFICERS: EMPLOYEES:
STATE EMPLOYEES: RETIREMENT: STATE
RETIREMENT SYSTEM: STATE EMPLOYEES'
RETIREMENT SYSTEM: UNIVERSITY OF
MISSOURI: MISSOURI UNIVERSITY:
CURATORS OF UNIVERSITY OF MISSOURI:
COLLEGES: STATE COLLEGES: STATE
TEACHERS COLLEGES: TEACHERS COLLEGES:

Employees of the University and colleges who are not covered under some other retirement or benefit fund to which the state is a contributor (not counting contributions under the Federal Old Age and Survivors' Insurance Act) qualify under the law to become members of the Missouri State Employees' Retirement System.



October 2, 1957

Honorable Newton Atterbury, Secretary
Missouri State Employees' Retirement System
State Capitol
Jefferson City, Missouri

Dear Sir:

You have recently requested an opinion from this office on the following question:

"Can employees of the University of Missouri and the State Teachers Colleges qualify under the law and become members of the Missouri State Employees' Retirement System?"

The law creating the Missouri State Employees' Retirement System was passed by the 69th General Assembly as House Bill No. 188, and after having been duly approved by the Governor, became effective August 29, 1957. This law is found in No. 4 of the 1957 Pamphlets to Vernon's Annotated Missouri Statutes as Sections 104.310 to 104.550, inclusive.

The qualification of employees under this plan is governed by the definition of "department" and "employee" found in Paragraphs 11 and 15, respectively, of Section 104.310. These definitions read as follows:

Honorable Newton Atterbury, Secretary

"(11) 'Department', any department, institution, board, commission, officer, court or any agency of the state government receiving state appropriations including allocated funds from the federal government and having power to certify payrolls authorizing payments of salary or wages against appropriations made by the federal government or the state legislature from any state fund, or against trusts or allocated funds held by the state treasurer;

"(15) 'Employee', any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the General Assembly, but not including any employee who is covered under some other retirement or benefit fund to which the state is a contributor, except this definition shall not exclude any employee as defined herein who is covered only under the Federal Old Age and Survivors' Insurance Act, as amended. As used in sections 104.310 to 104.550, the term 'employee' shall include civilian employees of the Army National Guard or Air National Guard of this State who are employed pursuant to section 709 of title 32 of the United States Code and paid from Federal appropriated funds;"

Your question concerns employees of the University of Missouri and the colleges, and with the exception of those who are excluded from the definition of employee because they are covered under some other retirement or benefit fund to which the state is a contributor, these employees clearly meet the definition of "employee" in the Act and therefore, the question for consideration is whether or not the University and the colleges come within the definition of "department" in the Act. The University and the colleges are without doubt, institutions as used in the definition of department. They receive state appropriations and they have power to certify payrolls authorizing payments of salary or wages against appropriations made by the state legislature.

Honorable Newton Atterbury, Secretary

Therefore, it appears that the University and the colleges come within the definition of department, and their employees, unless excluded because they come under some other retirement or benefit fund to which the state is a contributor, come under the definition of employee, and therefore, may qualify under the law.

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that the employees of the University and the various colleges who are not covered under some other retirement or benefit fund to which the state is a contributor (not counting contributions under the Federal Old Age and Survivors' Insurance Act) qualify under the law and are members of the Missouri State Employees' Retirement System.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Fred L. Howard.

Yours very truly,

JOHN M. DALTON
Attorney General

FLH:vlw

OFFICERS: STATE OFFICERS: EMPLOYEES:
STATE EMPLOYEES: STATE RETIREMENT
SYSTEM: STATE EMPLOYEES' RETIREMENT
SYSTEM: PUBLIC SCHOOL RETIREMENT
SYSTEM: TEACHERS' RETIREMENT SYSTEM:

The director and employees of the Public School Retirement System do not qualify under the law, and do not become members of the Missouri State Employees' Retirement System.

October 7, 1957

Honorable Newton Atterbury, Secretary
Missouri State Employees' Retirement System
State Capitol
Jefferson City, Missouri

Dear Sir:

You have recently requested an opinion from this office on the following matter:

"Can the director and employees of the Public School Retirement System qualify under the law and become members of the State Employees' Retirement System?"

The law creating the Missouri State Employees' Retirement System was passed by the 69th General Assembly as House Bill No. 188, and after having been duly approved by the Governor, became effective August 29, 1957. This law is found in No. 4 of the 1957 Pamphlets to Vernon's Annotated Missouri Statutes as Sections 104.310 to 104.550, inclusive.

The qualification of employees under this plan is governed by the definition of "department" and "employee" found in Paragraphs 11 and 15, respectively, of Section 104.310. These definitions read as follows:

"(11) 'Department', any department, institution, board, commission, officer, court or any agency of the state government receiving state appropriations including allocated funds from the federal government and

Honorable Newton Atterbury, Secretary

having power to certify payrolls authorizing payments of salary or wages against appropriations made by the federal government or the state legislature from any state fund, or against trusts or allocated funds held by the state treasurer;

"(15) 'Employee', any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the General Assembly, but not including any employee who is covered under some other retirement or benefit fund to which the state is a contributor, except this definition shall not exclude any employee as defined herein who is covered only under the Federal Old Age and Survivors' Insurance Act, as amended. As used in sections 104.310 to 104.550, the term 'employee' shall include civilian employees of the Army National Guard or Air National Guard of this State who are employed pursuant to section 709 of title 32 of the United States Code and paid from Federal appropriated funds;"

Your question concerns the director and those employed under him in the office of the teacher and school employees' retirement system created by Chapter 169, RSMo 1949, as amended. It will be noted that Section 169.030, RSMo 1957 Supplement, provides that: "The funds required for the operation of the retirement system" shall come from contributions made by the employees and the employer. These funds belong to the retirement system. They do not become funds of the state of Missouri, and may not be commingled with state funds under the provisions of Section 169.040, RSMo 1957 Supplement. When the public school retirement system was first set up, it was provided in Section 169.110 RSMo 1949 that the legislature might appropriate funds for the operation of this system until sufficient contributions were received to take care of the operation, but that such appropriations would be repaid by the system to the state.

Honorable Newton Atterbury, Secretary

Under this set up the system now receives no appropriations from the state but is an entirely self-sufficient unit operating on its own funds, which are by statute declared not to be state funds. Payment of administrative expenses and the compensation of the director and his employees are made from the fund, not from appropriations. Thus, the teachers and school employee retirement system cannot qualify under the definition of "department" as contained in Paragraph 11, of Section 104.310, quoted supra, since it does not receive state appropriations and does not have power to certify payrolls authorizing the payment of salary or wages against appropriations. Consequently, the director and his employees, or rather the employees of the system, cannot qualify under the law.

CONCLUSION

It is, therefore, on the basis of the foregoing the conclusion of this office that the director and employees of the Teacher and School Employee Retirement System cannot qualify under the law, and do not become members of the Missouri State Employees' Retirement System.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:vlw

FILED

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OFFICERS: STATE OFFICERS: EMPLOYEES:
STATE EMPLOYEES: RETIREMENT: STATE
RETIREMENT SYSTEM: CIVIL DEFENSE:
STATE SURVIVAL PLANS PROJECT:
SURVIVAL PLANS PROJECT:

Personnel of the Missouri
State Survival Plans Pro-
ject qualify under the
law to become members
of the Missouri State
Employees' Retirement
System.

October 7, 1957

Honorable Newton Atterbury, Secretary
Missouri State Employees' Retirement System
State Capitol
Jefferson City, Missouri

Dear Sir:

You have recently requested an opinion from this office
on the following question:

"Can employees of the Missouri State Sur-
vival Plans Project qualify under the
law and become members of the Missouri
State Employees' Retirement System?"

The law creating the Missouri State Employees' Retirement
System was passed by the 69th General Assembly as House Bill
No. 188, and after having been duly approved by the Governor
became effective August 29, 1957. This law is found in No. 4
of the 1957 Pamphlets to Vernon's Annotated Missouri Statutes
as Sections 104.310 to 104.550, inclusive.

The qualification of employees under this plan is governed
by the definition of "department" and "employee" found in Para-
graphs 11 and 15, respectively, of Section 104.310. These defini-
tions read as follows:

"(11) 'Department', any department, in-
stitution, board, commission, officer, court
or any agency of the state government receiv-
ing state appropriations including allocated
funds from the federal government and having
power to certify payrolls authorizing payments

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of salary or wages against appropriations made by the federal government or the state legislature from any state fund, or against trusts or allocated funds held by the state treasurer;

"(15) 'Employee', any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the General Assembly, but not including any employee who is covered under some other retirement or benefit fund to which the state is a contributor, except this definition shall not exclude any employee as defined herein who is covered only under the Federal Old Age and Survivors' Insurance Act, as amended. As used in sections 104.310 to 104.550, the term 'employee' shall include civilian employees of the Army National Guard or Air National Guard of this State who are employed pursuant to section 709 of title 32 of the United States Code and paid from Federal appropriated funds;"

This question concerns employees who are working under the provisions of the Missouri State-wide Operational Survival Plan Project Agreement, Contract No. CD-SP 57-55, between the United States of America and the State of Missouri, effective June 17, 1957. The work under this contract is required to be completed not later than June 17, 1958. The contract provides in Article II thereof, that the United States will reimburse the State of Missouri (and make certain advance payments) in an amount not to exceed \$158,157.50 for allowable costs as specified in the contract. These federal funds are by the contract to be advanced to and paid to the treasurer of the State of Missouri to be disbursed upon the direction of the State Director of Civil Defense. Allowable costs under this contract include, and primarily consists of, payments for personal services by persons performing the work required by the contract.

Honorable Newton Atterbury, Secretary

Article IV of the contract provides that the State of Missouri shall engage a planning staff to perform the functions required by the contract, which staff shall be acceptable to the Federal Civil Defense Administration. Thus, it appears that the persons performing services under this contract are hired by the State of Missouri, and their compensation is paid by disbursement from the treasury of the State of Missouri of funds advanced to the State of Missouri for that purpose, or for which the State of Missouri will be reimbursed by the federal government under the contract.

It thus appears that the people working on the State Survival Plans Project are hired, fired and paid by the State of Missouri and therefore, constitute employees within the definition of that term quoted supra.

Payments of compensation are made by the treasury of the State of Missouri on the direction and certification of the Missouri State Director of Civil Defense from funds advanced or reimbursed by the federal government; and thus it appears that the State Survival Plans Project is an agency of the state government receiving state appropriations including allocated funds from the federal government; and that it has power to certify payrolls authorizing payments of salary or wages against appropriations made by the federal government or the state legislature. It would, therefore, appear that all of the requirements of the definitions quoted supra are met and that these employees qualify under the law.

CONCLUSION

It is, therefore, the conclusion of this office that personnel of the State Survival Plans Project qualify under the law and become members of the Missouri State Employees' Retirement System.

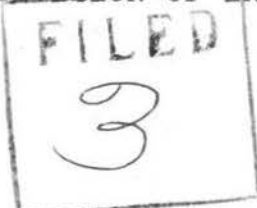
The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

OFFICERS: STATE OFFICERS: EMPLOYEES:
STATE EMPLOYEES: STATE EMPLOYEES"
RETIREMENT SYSTEM: STATE RETIREMENT
SYSTEM: INSURANCE: DIVISION: DIVISION
OF INSURANCE: EXAMINERS: INSURANCE
EXAMINERS: EXAMINERS OF THE DIVISION
OF INSURANCE: EXAMINERS IN THE
DIVISION OF INSURANCE:

Examiners in the Division
of Insurance qualify under the
law and become members of the
Missouri State Employees' Retirement System.



October 14, 1957

Honorable Newton Atterbury, Secretary
Missouri State Employees' Retirement System
State Capitol
Jefferson City, Missouri

Dear Sir:

You have recently requested an opinion from this office on
the following matter:

"The question has been raised as to whether
or not the examiners employed by the Division
of Insurance to make examination of insurance
companies licensed in this State, are covered
under the Missouri State Employees' Retirement
System, as the statute is presently worded.

"The Superintendent of Insurance is required
to examine the financial condition, affairs
and management of any insurance company in-
corporated by or doing business in this State,
and since it is a physical impossibility for
him to do so in person, he is authorized under
Section 374.110 and Section 374.190 R. S. Mo.
1949, to employ examiners and actuaries necessary
to do the actual work. * * *

"The per diem and expenses paid examiners are paid
direct to the examiners upon accounts approved
by the Superintendent. Section 148.400 R.S. Mo.
1949, provides that these examination fees paid
by the company may be deducted from the two
per cent premium taxes payable to the State
of Missouri. This is admittedly a unique
way of paying employees of the Division of
Insurance, but it is a system that has been
followed ever since the Insurance Department
was established and is common practice in most

Honorable Newton Atterbury, Secretary

of the other states in the United States."

The law creating the Missouri State Employees' Retirement System was passed by the 69th General Assembly as House Bill No. 188, and after having been duly approved by the Governor, became effective August 29, 1957. This law is found in No. 4 of the 1957 Pamphlets to Vernon's Annotated Missouri Statutes as Sections 104.310 to 104.550, inclusive.

The qualification of employees under this plan is governed by the definition of "department" and "employee" found in Paragraphs 11 and 15 respectively, of Section 104.310. These definitions read as follows:

"(11) 'Department', any department, institution, board, commission, officer, court or any agency of the state government receiving state appropriations including allocated funds from the federal government and having power to certify payrolls authorizing payments of salary or wages against appropriations made by the federal government or the state legislature from any state fund, or against trusts or allocated funds held by the state treasurer;

"(15) 'Employee', any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the General Assembly, but not including any employee who is covered under some other retirement or benefit fund to which the state is a contributor, except this definition shall not exclude any employee as defined herein who is covered only under the Federal Old Age and Survivors' Insurance Act, as amended. As used in sections 104.310 to 104.550, the term 'employee' shall include civilian employees of the Army National Guard or Air National Guard of this State who are employed pursuant to section 709 of title 32 of the United States Code and paid from Federal appropriated funds;"

These examiners are employed by the Division of Insurance pursuant to statutory authority as indicated in your request. They are selected by the Division, they hold their position at the pleasure of, and they may be discharged by, that Division. Under the statutory set up the money for their compensation and

Honorable Newton Atterbury, Secretary

expenses is initially paid by the company which is being examined, and such company is then allowed this amount as a deduction from the premium taxes paid by the company to the state of Missouri.

Thus, it is apparent that these examiners are employees as defined by Paragraph 15 of Section 104.310, supra. The Division of Insurance is a division within the Department of Business and Administration and as such is supported by appropriations made by the legislature for that purpose. Such appropriations cover compensation for personal services as well as the operating expenses of the Division, and the Division is authorized to certify payrolls authorizing the payment of salary or wages against appropriations. Thus, the Division of Insurance qualifies under the definition of "department" as contained in Paragraph 11 of Section 104.310, supra.

There is no requirement in the Retirement System Law that the individual employee under consideration be paid all or any part of his compensation directly from appropriations made by the legislature, or that his individual compensation be certified on payrolls authorizing payments against appropriations. The law is satisfied if the department has these powers generally. Here the examiner is an employee of the Division of Insurance which is a "department" as defined by the law. Therefore all requirements of the law are met.

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that examiners in the Division of Insurance qualify under the law and become members of the Missouri State Employees' Retirement System.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

Very truly yours,

John M. Dalton
Attorney General

FLH/vlw/lc

OFFICERS: STATE OFFICERS:
EMPLOYEES: STATE EMPLOYEES:
RETIREMENT: STATE RETIREMENT
SYSTEM: MAGISTRATES: CLERKS
OF MAGISTRATE COURTS:
MAGISTRATE CLERKS: CIRCUIT
COURT REPORTERS: REPORTERS
OF CIRCUIT COURTS: STATE
EMPLOYEES' RETIREMENT SYSTEM:

Court reporters, magistrate clerks and
magistrates are not covered by the Missouri
State Employees' Retirement System Law.



October 18, 1957

Honorable Newton Atterbury
Secretary, Missouri State
Employees' Retirement System
Jefferson City, Missouri

Dear Sir:

You have recently requested an official opinion from this office
concerning the following:

"Can court reporters, magistrate clerks and
magistrate judges, or any of them, qualify as
members of the Missouri State Employees'
Retirement System?"

House Bill No. 188 was enacted by the 69th General Assembly and
became effective, after having been duly approved by the Governor,
on August 29, 1957. This law now comprises Sections 104.310 to
104.350, RSMo Supp. 1957, as set out in the August, 1957, Pamphlet
Supplementing Vernon's Annotated Missouri Statutes. Section 104.310
(Section 1 of House Bill No. 188) contains the definitions of terms
used in this law. Paragraph 15 defines "employee," and Paragraph 11
defines "department." It is from the provisions of these two defini-
tions that we must determine whether or not the people about whom you
inquire can qualify under this law and become members of the Missouri
State Employees' Retirement System.

The definition of "employee" is as follows:

"(15) 'Employee' any elective or appointive officer
or employee of the state who is employed by a de-
partment and earns a salary or wage in a position
normally requiring the actual performance by him
of duties during not less than one thousand five
hundred hours per year, including each member
of the General Assembly, but not including any
employee who is covered under some other retire-
ment or benefit fund to which the state is a
contributor, except this definition shall not

Honorable Newton Atterbury, Secretary

exclude any employee as defined herein who is covered only under the Federal Old Age and Survivors' Insurance Act, as amended. As used in sections 104.310 to 104.550, the term 'employee' shall include civilian employees of the Army National Guard or Air National Guard of this State who are employed pursuant to section 709 of title 32 of the United States Code and paid from Federal appropriated funds; * *

The definition of "department" is as follows:

"(11) 'Department', any department, institution, board, commission, officer, court or any agency of the state government receiving state appropriations including allocated funds from the federal government and having power to certify payrolls authorizing payments of salary or wages against appropriations made by the federal government or the state legislature from any state fund, or against trusts or allocated funds held by the state treasurer; * *

As to magistrates, the salaries of regular magistrates are paid by the state, whereas the salaries of "additional magistrates" are paid by the county as provided in Section 482.150 RSMo Supp. 1955. Likewise, the clerks of the magistrate courts are paid from the same sources as are the magistrates under whom they serve.

In order to qualify under this act a magistrate must be an "elective or appointive officer, or employee of the state who is employed by a department. . . ." There is grave question as to whether or not a magistrate is either an officer or employee of the state. Likewise, the definition of employee excludes "any employee who is covered under some other retirement or benefit fund to which the state is a contributor." Section 27 of Article V of the Constitution includes magistrates amongst those who may receive benefits when retired for disability during his term. This again creates a serious problem as to whether or not magistrates may qualify. However, in view of the conclusion reached hereinafter in this opinion we do not find it necessary to pass upon these questions.

Since an employee must be one who is "employed by a department" it becomes necessary to consider the statutory definition of department. This definition is set out above. After careful consideration it is concluded that neither a magistrate nor the magistrate court, of which the magistrate is the judge, comes within the definition of department. Such department must be one which receives state appropriations, and while some magistrates are paid by the state of Missouri out of funds appropriated by the Legislature, these appropriations are not made to the magistrate

Honorable Newton Atterbury, Secretary

or to the magistrate court but the appropriation is to a fund created in the treasury out of which payment is made to the various magistrates.

Thus it is concluded for the reasons indicated that neither the magistrate nor the magistrate court is a department within the above definition, and, consequently magistrates cannot qualify under the law and do not become members of the Missouri State Employees' Retirement System.

As to the clerks of magistrate courts, their situation is essentially the same as that of the magistrate. They are paid by the state out of appropriations, but such appropriations are not made to the magistrate or the magistrate court by whom they are employed, and since it has been held that the magistrate or magistrate court is not a department it is clear that the clerk is not an employee of a department, and, therefore, cannot become a member of the Missouri State Employees' Retirement System.

As to circuit court reporters, they are paid one-fourth out of the state treasury and three-fourths out of the treasuries of the county or counties comprising the circuit which they serve. See Section 485.065 RSMo Supp. 1955. Again, as is discussed above, the appropriation for the one-fourth of the court reporter's salary is not made to the circuit court but is made to a fund in the state treasury out of which these payments are made to the reporters. It is, therefore, concluded that the reporters of the various circuit courts cannot qualify under the law and do not become members of the Missouri State Employees' Retirement System.

CONCLUSION

On the basis of the foregoing, it is the conclusion of this office that neither magistrates, magistrate clerks, nor circuit court reporters can qualify under the law and become members of the Missouri State Employees' Retirement System.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

Very truly yours,

John M. Dalton
Attorney General

FLH:vlw:ld

COUNTY COURT:
COUNTY BUDGET:
NURSING HOMES:

Right of county court to expend proceeds of sale
of county farm during 1957 and 1958.



August 8, 1957

Honorable W. Frazier Baker
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Mr. Baker:

This will acknowledge receipt of your opinion request which
reads:

"On February 28, 1957 and subsequent thereto,
the County of Callaway sold what was generally
called the Poor Farm or County Farm which was
owned and operated by the County of Callaway
under and by virtue of Sections 205.580 to
205.760 inclusive. The proceeds from the sale
of this farm have been deposited with the
treasurer of Callaway County, Missouri. An
opinion is requested, at the instance of the
County Court, and as to whether or not the
proceeds of this sale can be used by Callaway
County during the calendar year of 1957 or in
the calendar year of 1958.

"Opinion is also requested as to whether or not
the recent Nursing Home law passed by the legisla-
ture in the session ending previously in 1957
has any bearing upon the previous question."

We assume that your first inquiry specifically relates to the
authority of the county court to use the proceeds from the sale of
the county farm, during 1957, and for the purpose of constructing
and equipping a nursing home as authorized by Senate Bill 244,
passed by the 69th General Assembly of the State of Missouri,
approved by the Governor on June 10, 1957, and which becomes a law

Honorable W. Frazier Baker

and effective on August 29, 1957. We believe that it can further be assumed that your budget for the year 1957 does not include any such item of expenditure. Therefore, the first thing to determine is if the county can make any expenditure for any item during 1957, that is not included in the budget for that year.

Section 7, Article VI, Constitution of Missouri provides that the county court shall manage all county business as prescribed by law.

Section 24, Article VI, Constitution of Missouri, requires counties as prescribed by law, to have an annual budget, file annual reports of their financial transactions and be audited.

Under Section 49.270, RSMo 1949, the county court is vested with control and management of all property belonging to the county. Furthermore, the county court, under Section 50.680 is authorized, empowered and directed, at the February term of court every year, to record and file with the county treasurer and state auditor a budget of estimated receipts and expenditures for the year beginning January 1, and ending December 31, and that section further requires the county court to classify proposed expenditures.

Section 50.670, RSMo 1949, provides that all counties of the third and fourth classes shall be governed by Sections 50.670 to 50.740, RSMo 1949.

Section 2 of Senate Bill 244, supra, authorizes the use of county funds, generally, to construct and equip nursing homes and that the expenditure is not limited to proceeds of the sale of a county farm. Said section reads:

"(2) The county court of any county may acquire land to be used as sites for, construct and equip nursing homes and may contract for materials, supplies and services necessary to carry out such purposes."

All of the foregoing statutes and constitutional provisions clearly indicate that the general intent in enacting and adopting same was that all county business shall be operated on a cash basis for the fiscal year, January 1 to December 31, and not to exceed the anticipated revenue for the fiscal year and any unexpended balances for prior years.

The Supreme Court of Missouri, en banc, in State vs. Gribb,

Honorable W. Frazier Baker

273 S.W.(2d) 246, 1.c. 250, said:

"[6] The object of the constitutional provision, Sec. 26(a) of Article VI, and the 'County Budget Laws,' supra, is to compel counties and municipalities to operate on a cash basis. In other words, the governing body may not obligate the county or municipality in a sum in excess of the revenue provided for any one year. The sum available to be spent in any one year is the revenue provided for that year 'plus any unencumbered balances from previous years.' Sec. 26(a) supra. We rule that the County Court of Macon County in 1952 did not, in the matter of expenditures, violate the provisions of the Budget Law."

The court in that decision further held that it is common knowledge that unforeseen events often occur which require expenditures in excess of the amount assigned to certain classes and if the budget for such class is not sufficient to take care of same, the county court may use money in class 6, provided, however, there is a sufficient sum in that class not subject to restrictions mentioned in the statute. In so holding the court, at 1.c. 249 and 250, said:

"[3-5] It will be noted that the funds assigned to Class 6 may be expended with certain restrictions for 'any lawful purpose'. (Emphasis ours.) One of the restrictions imposed is that 'there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six; * * * * *'. In other words, the funds in Class 6 may not be depleted unless the funds in the other classes are sufficient to pay all claims contracted to be paid out of the funds in such classes. The intention of the Legislature, as evidenced by the provisions supra, established Class 6 somewhat as a guarantee that all claims in the preceding classes shall be paid. It is common knowledge that unforeseen events often occur which require expenditures in excess of the amount assigned to a certain class such as Class 3, the bridge and road fund. If the budget for such class is not sufficient to take care of the unforeseen expense, the county

Honorable W. Frazier Baker

court may use money in Class 6, provided there is a sufficient sum in that class that is not subject to the restrictions mentioned in the statute. It is apparent that that was done in this case when it became evident that Class 3 expenditures might exceed the sum allocated to that class by the budget."

In view of the foregoing decision in *State v. Cribb*, supra, we are inclined to believe that any such expenditure of money as proposed herein would be considered as a lawful purpose in view of Senate Bill 244 becoming effective on August 29, 1957, notwithstanding the fact there was no such item of expense included in the budget for 1957. Such proposed expenditure would amount to an unforeseen event as referred to in said decision.

As to whether the proceeds of said sale could be used during 1957, our answer is in the affirmative since such money under the statute is not specifically allocated to any particular fund, as in the case of the sale of personalty, farm products, or equipment; at said county poor farm wherein the law requires moneys received from the sale thereof to go into a particular fund to be used in a certain manner. The proceeds from this sale would go into the general revenue fund of the county (see copy of attached opinion to Honorable A. B. Wright, under date of September 28, 1945) and could be used for the purpose of constructing and equipping a nursing home as provided only after satisfaction of payment of all items budgeted for 1957 in all classes, including class 6, and also provided that all outstanding warrants under any class for all prior years have been fully satisfied.

We believe that the foregoing answers your second inquiry as well as your first inquiry.

CONCLUSION

Therefore, it is the opinion of this Department that proceeds from the sale of the county poor farm in Callaway County may be used to construct and equip a nursing home as provided in Senate Bill 244, passed by the 69th General Assembly, and which becomes effective August 29, 1957, during the current year 1957, provided there are sufficient funds on hand for the payment of all items

Honorable W. Frazier Baker

included in the budget approved by the county court for 1957, including those in class 6, and, further, that all warrants drawn under all classes for all prior years are fully satisfied.

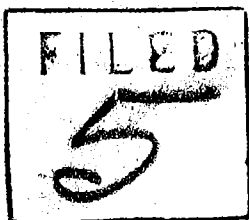
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

CONSTITUTIONALITY:

Sections 390.171 and 390.176, RSMo
1949, are constitutional.



January 21, 1957

Honorable Harold W. Barriek
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"A matter has arisen in Pettis County, which raises some questions on which I would like an official opinion from your office. The facts are these:

"A summons was issued by a Trooper of the Missouri State Highway Patrol to the owner of a vehicle for failure to have the proper markings on his vehicle to comply with P.S.C. Rule No. 23, subsection b. The Trooper, acting under directions from Missouri State Highway Patrol headquarters filed the necessary information in my office for a prosecution of the defendant under Chapter 390, 1955 Supplement R.S. Missouri.

"I would like an opinion from your office of the following question:

"Does Section 390.131 contain constitutional authority for the P.S.C. to lay down rules of operation for P.S.C. licensees, the violation of which will subject the violator to criminal prosecution under Section 390.171 and 390.176. The question which comes immediately to my mind is whether or not such action is an unconstitutional delegation of the legislative power, which if allowed

Honorable Harold W. Barrick

would empower persons other than the legislature to designate what might constitute a criminal offense in the State of Missouri."

Your question is whether Sections 390.171 and 390.176, RSMo 1949, are constitutional.

We first note that Sections 390.171 and 390.176 are similar in that they both relate to rules and regulations laid down by the Public Service Commission. We further note that the subject matter covered by Section 390.171 is the same as that of Section 390.170 which was repealed by House Bill No. 183, Section 1, Laws of Missouri 1951.

We further note that in the case of *State v. Dixon*, 73 S.W. 2d 385, 1.c. 387, the Missouri Supreme Court held that the legislature did not delegate to the Public Service Commission any legislative authority. In this respect the court stated:

"This question alone remains. Did the Legislature have the authority to declare the violation of a rule of the commission to be a crime? It must be kept in mind that the states of our Union are sovereign states; that is, they have inherent power, and their Legislatures can pass any law which they may deem necessary for the welfare of the people and which is not prohibited by State or Federal Constitutions. In 51 C.J. p. 32, Sec. 7, we read: 'A constitutional provision authorizing the legislature to create a public utility commission is merely a declaration or recognition of the legislature's inherent authority, and not a grant or limitation of power, and so the rule of exclusion of things not ex-

Honorable Harold W. Barrick

pressed does not apply.'

"The Legislature in this case, and not the Public Service Commission, has declared that a violation of a safety rule promulgated by the Public Service Commission shall constitute a misdemeanor. The Legislature, not the Public Service Commission, has prescribed what penalty shall be imposed in case of a conviction of that offense.

"This identical question was before the Supreme Court of Massachusetts in the case of *Brodhine v. Revere*, 182 Mass. 598, 66 N.E. 607, 608. In that case a statute of the state created a park commission with authority to 'make rules and regulations for the government and use of the roadways or boulevards under its care.' The statute also made the violation of any such rules a misdemeanor. The contention was there made, as here, that the statute was unconstitutional as a delegation of legislative power. The court in denying this contention said in part: 'There is also strong ground for the contention that the quoted language of the statute simply leaves to the board the administration of details which the Legislature cannot well determine for itself, and which it may therefore leave to the determination of a subordinate tribunal, and that the substance of the legislation is found in that part of the statute which prescribes punishment for disregard of the regulations so determined.'

"Our statute is similar in that the

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Public Service Commission was created as an administrative body with authority to regulate public utilities of this state as well as the transportation for hire of passengers and freight over the highways. It is an elaborate system covering the entire field of regulation. The Legislature, however, has kept to itself, and properly so, the power to prescribe what acts shall constitute a crime and what punishment may be assessed in case of a conviction. The Legislature has deemed it proper and necessary, in order to give force and effect to the orders, rules, and regulations promulgated by the commission, to say that a violation thereof shall be a misdemeanor.

"The Supreme Court of the United States has also spoken on this subject in the case of United States v. Grimaud, 220 U. S. 506, 31 S. Ct. 480, 483, 55 L.Ed. 563. In that case Congress had by an act established forest reservations. Their use for grazing and other lawful purposes to be subject to rules and regulations established by the Secretary of Agriculture. The violation of any such rules was made a crime. Grimaud was indicted for grazing sheep on a reservation in violation of a rule promulgated by the Secretary of Agriculture. A demurrer filed by the defendant was sustained. On appeal to the Supreme Court the ruling of the lower court was first affirmed by a divided court. The case was then restored to the docket, reargued, and the court, by a unanimous opinion, reversed the ruling of the lower court. The precise questions raised in the case at bar were there decided. It was held

Honorable Harold W. Barrick

that Congress had the power to authorize an administrative body to make certain rules and regulations; that in so doing Congress had not delegated any legislative authority. The court said in part:

* "From the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations, - - not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done. * * *

"That "Congress cannot delegate legislative power (to the President) is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." Field v. Clark, 143 U.S. 649, 692, 12 S. Ct. 495, 36 L.Ed. 294, 309. But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense."

"So in the case at bar, the state legis-

Honorable Harold W. Barrick

lature did not delegate to the Public Service Commission any legislative authority; neither did the commission exercise such authority when it enacted certain safety rules to be observed by the operators of trucks and busses. It was the Legislature that enacted the law declaring the violations of these rules to be misdemeanors and prescribed the penalties to be inflicted. With these matters the Public Service Commission, under the law, had and has nothing to do. It follows that the trial court was in error when it sustained respondent's demurrer to the information."

CONCLUSION

It is the opinion of this department that Sections 390.171 and 390.176, RSMo 1949, are constitutional.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

RECORDING OF
TELEPHONIC
COMMUNICATIONS:

Where authorities of State Hospital No. 1 obtain consent of relative or person authorized to give such consent for an operation or autopsy to be performed upon an inmate of State Hospital, having a state hospital employee "listen in" to the conversation would be permissible. Also permissible to have a recording machine attached to the telephone at the State Hospital, which machine would record the conversation giving consent. Such recording machine would be subject to regulations set forth in the order of the Missouri Public Service Commission.

FILED

June 28, 1957

Dr. A. K. Baur
Superintendent
State Hospital No. 1
Fulton, Missouri

Dear Dr. Baur:

Your recent request for an official opinion reads:

"A question has come up in connection with the obtaining of autopsy and operation permissions and we would appreciate a legal decision from you pertaining to this matter.

"The question is as follows: In obtaining permission from the responsible next of kin to perform an autopsy or an operation on one of our patients, to obtain such permission by telephone if (1) another hospital employee (telephone operator) listens in and witnesses the oral permission, or (2) if we obtain a recording device attached to the switchboard which will record the verbal permission given by the next of kin for an autopsy or operation.

"I may say that in the Veteran's Administration this method of obtaining permission was considered routine. Such a procedure would expedite matters considerably because at the present time we request the next of kin to verify the permission by sending a collect telegram to the Hospital which may delay matters several hours."

Your request raises the question of what consent to perform an operation and/or autopsy will be deemed legally sufficient to comply with the requirements of the law and to afford adequate protection to the authorities of the State Hospital against any actions which might be brought against them in connection with the above matters.

Dr. A. K. Baur

There is a law regarding consent for autopsies. Section 194.115, Laws of Missouri, 1953, page 629, reads in part:

"1. It shall be unlawful for any licensed physician and surgeon to perform an autopsy or post-mortem examination upon the remains of any person without the consent of one of the following:

(1) The deceased, if in writing, and duly signed and acknowledged prior to his death; or

(2) The surviving spouse; or

(3) If the surviving spouse through injury, illness or mental capacity is incapable of giving his or her consent, or if the surviving spouse is unknown, or his or her address unknown or beyond the boundaries of the United States, or if he or she has been separated and living apart from the deceased, or if there is no surviving spouse, then any surviving child, parent, brother or sister, in the order named; or

(4) If no surviving child, parent, brother or sister can be contacted by telephone or telegraph, then any other relative, by blood or marriage; or"

It will be noted that subparagraph 4 above contemplates obtaining consent by telephone or telegraph. If such a method of obtaining consent is sufficient for an autopsy it would appear to us to be sufficient for obtaining consent for an operation.

In case consent is obtained by telephone, having, as you suggest, a state hospital employee "listen in" to the conversation would strengthen the position of the hospital if any question ever arose as to whether consent was obtained.

There is no Missouri law which would prohibit this, and we believe that such third person would be permitted to testify regarding the conversation which he had overheard. As we stated, there is no prohibition in the Missouri law against it.

Section 605 of Chapter 47 of the United States Code Annotated does state in part that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or

Dr. A. K. Baur

meaning of such intercepted communication to any person * **." The above specifically relates to communications by telephone and telegraph. However, it would appear that the operation suggested by you above would not come within this prohibition. In the case of *Flanders v. United States*, 222 F. 2d 163, at l.c. 167, the United States Court of Appeals of the sixth district stated:

"(1) We are of the opinion that where, by means of an extension phone, or other device, a third party 'listens in' on a telephone conversation with the consent of one of the parties to the conversation, there is no interception of the communication, within the meaning of the statute. With respect for the high authorities that hold a contrary opinion, we are persuaded by the reasoning of those that adopt this view, and consider that the route we follow was pointed out by the Supreme Court in *Goldman v. United States*, supra."

We also note your question in regard to the use, by you, of a recording device to be attached to your telephone to be used to record conversations giving consent for autopsies and operations. There is no Missouri statutory law prohibiting or regulating this practice. However, on April 21, 1953, the Southwestern Bell Telephone Company issued a regulation which was filed with the Missouri Public Service Commission, which Commission, on May 21, 1953, promulgated the following regulation:

**"D. CONNECTION WITH CUSTOMER-OWNED VOICE
RECORDING EQUIPMENT**

1. Regulations

a. General

Customer-owned voice recording equipment for the recording of telephone conversations may be used in connection with the facilities of the Telephone Company subject to the following conditions:

(1) Connection with Telephone Company Facilities

(a) Connection of customer-owned voice recording equipment with the facilities of the Telephone Company shall be made only through recorder connector equipment which contains a device automatically producing a dis-

tinctive recorder tone that is repeated at intervals of approximately fifteen seconds when the recording equipment is in use, except that in the case of a private line service which has no connection with the exchange or toll system of the Telephone Company recorder connector equipment which does not contain the automatic tone device may be used at the option of the customer.

(b) Permanent connection shall be made only through recorder connector equipment furnished, installed, and maintained by the Telephone Company.

(c) Connection may be made through portable recorder-connector equipment provided such equipment is obtained from and is maintained by the Telephone Company. The portable recorder-connector equipment shall be connected with the telephone line through jacks installed by the Telephone Company on each line or at each station used for recording purposes, except that where recording is done at a cord switchboard, a portable jack box supplied and maintained by the Telephone Company may be used.

(d) The customer-owned voice recording equipment shall be so arranged that at the will of the user it can be physically connected to and disconnected from the facilities of the telephone company or switched on and off.

(2) Responsibility of the Telephone Company

Telephone service furnished by the Telephone Company is not represented as adapted to the recording of telephone conversations by means of voice recording equipment. The use of customer-owned voice recording equipment in connection with the facilities of the Telephone Company is permitted only on the condition that the liability of the Telephone Company for damages arising out of mistakes, omissions, interruptions, delays, or errors or defects in transmission, or failures or defects in the recorder connector equipment occurring in the course of furnishing service or other facilities and not caused by the negligence of the customer, or of the Telephone Company

Dr. A. K. Baur

in failing to maintain proper standards of maintenance and operation and to exercise reasonable supervision, shall in no event exceed an amount equivalent to the proportionate charge to the customer for the period of service during which such mistake, omission, interruption, delay, or error or defect in transmission, or failures or defects in the recorder connector equipment occurs."

The above provision applies only to Southwestern Bell telephone lines. We have ascertained the fact to be that the telephone system at State Hospital No. 1 is owned and operated by Southwestern Bell. Therefore, State Hospital No. 1 would come within the compass of the Missouri Public Service Commission regulation.

CONCLUSION

It is the opinion of this Department that in instances where authorities of State Hospital No. 1 obtain consent from a relative or other person authorized to give such consent for an operation or autopsy to be performed upon an inmate of the State Hospital, that having a state hospital employee "listen in" to the conversation would be permissible and that it would also be permissible to have a recording machine attached to the telephone at the State Hospital, which machine would record the conversation giving consent, but that such recording machine is subject to the regulations set forth in the order of the Missouri Public Service Commission stated above.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW/mw/b1

SHERIFFS: A person appointed to fill a vacancy in the office of sheriff, which vacancy occurred less than nine months prior to the holding of a general election, at which election a sheriff was elected for a full four year term, would continue in the office of sheriff until the first day of the succeeding year and until a person elected to the office at the general election was duly qualified.



January 7, 1957

Honorable G. C. Beckman
Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"We have the following problem in Crawford County, Missouri.

"Mr. Rollen L. Giles, who was the duly elected and qualified Sheriff of Crawford County, Missouri, died on March 26th, 1956. Thereafter, on March 30th, 1956, the County Court of Crawford County, acting under the provisions of Section 57.080, Revised Statutes of Missouri, 1949, appointed Perle Giles, as Sheriff of Crawford County, to fill the vacancy created by the death of Mr. Rollen L. Giles.

"At the general election, held on November 6th, 1956, Mr. Mont Turnbough was duly elected Sheriff of Crawford County, Missouri, and has qualified for this office on November 13th, by filing a bond, which has been approved by the Circuit Judge.

"The present question is as follows: Who is the Sheriff from November 13th, 1956 to January 1st, 1957. Section

Honorable G. C. Beckman

57.080 appears to say that Mr. Turnbough would be Sheriff; while Section 57.010 appears to say that Turnbough would not take over the duties of the office until the 1st day of January, 1957.

"Since the answer to this question is rather urgent, I would appreciate a reply as soon as possible."

Section 57.010, RSMo 1949, reads:

"At the general election to be held in 1948, and at each general election held every four years thereafter, the qualified voters in every county in this state shall elect some suitable person sheriff. No person shall be eligible for the office of sheriff who has been convicted of a felony. Such person shall be a resident taxpayer and elector of said county, shall have resided in said county for more than one whole year next before filing for said office and shall be a person capable of efficient law enforcement. When any person shall be elected sheriff, the clerk of the county court shall deliver to him a certificate of his election, under the seal of the court, and shall also certify that fact to the clerk of the circuit court, who shall file the certificate in his office; and he shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election."

Honorable G. C. Beckman

Section 57.080 reads, in part:

"Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county court; if such vacancy happen more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold said office until the person chosen at such election shall be duly qualified, otherwise the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified;
* * *."

It will be noted that Section 57.080, supra, holds that whenever the office of sheriff becomes vacant more than nine months prior to the holding of a general election that the county court shall order a special election to fill the vacancy. It would clearly appear from this section that the person appointed would hold until January 1, 1957. Section 57.010, supra, clearly states that a person elected at the general election in 1948 and at general elections held every four years thereafter, "shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election." It would seem to us that this would leave no doubt regarding the matter, when a sheriff was elected for a full four year term as is the case here.

CONCLUSION

It is the opinion of this department that a person ap-

Honorable G. C. Beckman

pointed to fill a vacancy in the office of sheriff, which vacancy occurred less than nine months prior to the holding of a general election, at which time a sheriff was elected for a full four year term, would continue in the office of sheriff until the first day of the succeeding year and until a person elected to the office at the general election was duly qualified.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

SPECIAL ROAD DISTRICTS:
COMMISSIONER SELLING ROAD
BUILDING MATERIAL OR LABOR
TO DISTRICT, NOT GUILTY OF
CRIME:
WHEN:

Commissioner of special city or town
road district, non-township organization
county, organized under Secs. 233.010 to
233.165 RSMo 1949, who in individual
capacity, sells material and labor for
building and repairing district roads
to commission of which he is a member;
absent fraud, transaction is not criminal
offense, and commissioner will not

have violated Sec. 61.300 or Secs. 61.170 to 61.300 RSMo 1949, and
cannot be found guilty of a misdemeanor; cannot be punished as pro-
vided by Sec. 61.310 RSMo 1949, and will not violate any other criminal
statutes.

January 15, 1951

Honorable G. C. Beckham
Prosecuting Attorney
Crawford County
Steelville, Missouri



Dear Mr. Beckham:

This is to acknowledge receipt of your recent request for
a legal opinion of this department reading as follows:

"My problem concerns a special road district,
which has been organized and exists under and
by virtue of Chapter 233 R.S. Mo. 1949. The
special road district is in Crawford County,
and Crawford County is a County of the fourth
class.

"The question is as follows: 'If the commis-
sioners of such a road district, as individuals,
sell to the Road District Commission road build-
ing materials, and furnish the labor for build-
ing and repairing the roads, does that consti-
tute any criminal offense, under the laws of
the State of Missouri?' It would appear that
Section 61.300 and Section 61.310 R.S. Mo.
1949 touch on this subject. Section 61.300,
which appears to define the offense, does not
include 'Commissioners of a Road District'.
However, Section 61.310, which purports to fix
the penalty, does include 'other road official'.

"I would like to have your opinion as to whether
or not the sections, above referred to, would be
violated by the Commissioners of the Special

Honorable G. C. Beckham

Road District in contracting with themselves for the District.

"If these sections would not be violated by such conduct, then can you point out any other section of the statute that would be violated by such conduct?"

Sections 61.160 to 61.310 RSMo 1949, are in regard to the appointment, qualifications, duties and the penalty for failure to perform the duties thus imposed, and also the penalty provided for violations of any of said sections by the officers named in Chapter 61 RSMo 1949.

Section 61.300 RSMo 1949, prohibits any of the officials specified therein from being the sales agent for compensation, or to be pecuniarily interested in any contract for the building of any culvert, bridge, road, road repairs, tools or machinery to any county or road district of which he is an officer. Said section reads as follows:

"No county highway engineer, county surveyor or deputy county highway engineer, or deputy county surveyor or road overseer shall be the sales agent, for compensation in the sale to, or purchase by, the state, county or road districts of road tools, culvert or bridge material or machinery, or be pecuniarily interested in any contract for the building of any bridge or culvert or for the improvement of any public road to which the county or any road district is a party."

Section 61.310 RSMo 1949, provides that the officers named therein who violate certain sections of Chapter 61, or who fail or refuse to perform any duties imposed thereby, shall be deemed guilty of a misdemeanor and upon conviction shall be punished in the manner specified. Said section reads as follows:

"Any county highway engineer, deputy county highway engineer, county surveyor, deputy county surveyor, road overseer or other road official or county officer who shall violate any of the provisions of sections 61.170 to 61.300, or who shall willfully neglect or fail to perform any of the duties by these sections imposed upon such officer or official, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be

Honorable G. C. Beckham

punished by a fine of not less than five dollars nor more than five hundred dollars."

Section 61.300, supra, names these officers: county highway engineer, deputy county highway engineer, county surveyor, deputy county surveyor, and road overseer.

Section 61.310 RSMo 1949, or the penalty section, names all of said officers and then attempts to broaden the scope of the various classes of officers referred to by stating "or other road official or county officer who shall violate any of the provisions of Secs. 61.170 to 61.300 * * *."

Since special road district commissioners are not specifically referred to as such in Sec. 61.300, Sec. 61.310, supra, or in any other portion of Chapter 61, you inquire in the first question of the opinion request if special road district commissioners would violate Secs. 61.300 and 61.310 by contracting with themselves in the manner stated. The correct answer to this inquiry cannot be given until it is first determined whether a special road district commissioner is included in "other road official or county officer" within the meaning of those terms as used in Sec. 61.310, supra. A determination of the legislative intent and purpose of the statute, and particularly the meaning of the terms referred to above, will depend upon the construction given said statute. It is quite clear that the Secs. 61.300 and 61.310 were intended to apply to each of the officers mentioned, but it is not clear what officers the lawmakers intended to designate as other road officials or county officers.

It is believed that the rules of statutory construction, as enunciated by the appellate courts of this state, are so well known that it would serve no useful purpose in the furtherance of our present discussion to cite cases setting out such rules. However, it is also believed to be sufficient for our purpose, to remind you of that primary rule of statutory construction to the effect that it is necessary to ascertain the lawmakers' intent from the words used in the statute, if possible, and to give the language of the Legislature its plain and rational meaning, and to promote its object and the manifest purpose of the statute. With this rule in mind, we again examine the sections of the statute before us. We repeat, that the officers named in Sec. 61.300 are prohibited from contracting with the state, county, board or other body of which they are members, and Sec. 61.310 states that any

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officer who does so, or fails to perform any of the duties imposed by Secs. 61.170 to 61.300, shall be guilty of a misdemeanor and subject to the penalty provided by Sec. 61.310. We note that commissioners of special road districts are not specifically mentioned in either section. Obviously, a special road district commissioner is not ordinarily classified as a county officer, but in some instances might be referred to as a road official. It is our belief, and we shall endeavor to show that such commissioner cannot properly be classified as "other road official" within the meanings of the terms as used in the section. Section 61.310 is a criminal statute, as it defines certain acts therein described to be misdemeanors and fixes the maximum and the minimum punishment which may be assessed against one who violates any of the provisions of Secs. 61.170 to 61.300.

It has long been the rule, upheld by a long line of appellate court decisions, that criminal statutes are to be strictly construed against the state, and liberally construed in favor of one accused of violating such statutes. The court reaffirmed this rule in the case of *State v. White*, 363 Mo. 83, and at l.c. 86 said:

"Strict construction of criminal statutes is a fundamental principle of our law. 'Criminal statutes are to be construed strictly; liberally in favor of the defendant, and strictly against the state, both as to the charge and the proof. No one is to be made subject to such statutes by implication.' *State v. Bartley*, 304 Mo. 58, 263 S.W. 95, 96; See also *State v. Lloyd*, 320 Mo. 236, 7 S.W. (2d) 344; *State v. Taylor*, 345 Mo. 325, 133 S.W. (2d) 336; *State v. Dougherty*, 358 Mo. 734, 216 S.W. (2d) 467; *Tiffany v. National Bank of Missouri*, 18 Wall. 409, 85 U.S. 409, 21 L. Ed. 862. A defendant should not be held to have committed a crime by any act which is not plainly made an offense by the statute. The question here is: Has the legal duty to support an illegitimate child been imposed upon its father? As pointed out in the *Canfield* case, there is no other statute which has changed the common law rule and specifically imposed upon the father of

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an illegitimate child the legal duty to support it. Certainly, Section 559.350 does not specifically do so. Therefore, we do not think that Section 559.350, a criminal statute, can be reasonably construed as creating this legal duty especially in view of the words 'any other person having the legal care or custody of such minor child.' As said in the Canfield case, 'The use of the words "or any other person," etc., in these sections, which statutes must be strictly construed, shows that the words apply to persons who are charged with the care and custody of the child whether it be a parent or other person so charged.'" * * *

The opinion in the case of State v. Bartley, 263 SW 95, is also in the same vein, except that it goes further in scope than the above-mentioned case and declares that no one is made subject to a criminal statute by implication. At l.c. 96 the Supreme Court of Missouri said:

"We must, therefore, look to the statute for the definition of incest. Are uncles and aunts of the half blood, as well as of the whole blood, within the prohibited degrees of relationship? Criminal statutes are to be construed strictly; liberally in favor of the defendant, and strictly against the state, both as to the charge and the proof. No one is to be made subject to such statutes by implication. Where one class of persons is designated as subject to its penalties, all others not mentioned are exonerated. State v. Jaeger, 63 Mo. 403, 409; State v. Gritzner, 134 Mo. 512, 527, 36 S.W. 39; State ex rel. v. State Board of Health, 288 Mo. 659, 671, 232 S.W. 1031; State v. McMahon, 234 Mo. 611, 137 S.W. 872. Such statutes are not to be 'extended or enlarged by judicial construction, so as to embrace offenses or persons not plainly [written] within their terms.' 'The reason of the rule is found in the tenderness of the law for individuals, and on the plain principle that the power of punishment is vested in the Legislature, and not in the

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judicial department.' State v. Reid, 125 Mo. 43, 48, 28 S.W. 172, 173, and cases cited. We cannot interpolate into the statute the words 'uncles and aunts of the half blood.' State v. Owens, 268 Mo. 481, 485, 187 S.W. 1189. We might, with equal propriety, interpolate the words 'first cousins' into the statute, because section 7299, R.S. 1919, forbids their intermarriage. The statute cannot be 'regarded as including anything not within its letter, as well as its spirit; which is not clearly and intelligibly described in the words of the statute, as well as manifestly intended by the Legislature.' * * *

In view of the foregoing, it is our thought that any of the officers specifically named in Secs. 61.300 and 61.310, supra, who violate the former section by contracting with the state, county, or road district of which he is a member, while acting as sales agent for compensation for the purchase of labor, materials or tools for the county or road district, and in which contract he is pecuniarily interested, or who violates any of the provisions, or fails to perform any of the duties imposed upon him by Secs. 61.170 to 61.310, would be deemed guilty of a misdemeanor and upon conviction subject to the punishment authorized by Sec. 61.310.

It is our further thought that the terms "other road officials" as used in Sec. 61.310, supra, were intended by the lawmakers to refer only to any other road official or county officer than those specifically named or impliedly referred to in Secs. 61.170 to 61.300, to which that portion of Chapter 61 applies. Such terms have no application to commissioners of special road districts who have not been specifically or impliedly referred to in the chapter. It further appears that a commissioner who contracts with himself in the manner referred to in the opinion request, or who fails to perform any of the statutory duties referred to, would not violate such sections and could not be legally convicted and punished in accordance with the provisions of Sec. 61.130, supra, therefore, our answer to the first inquiry of the opinion request is in the negative.

The second inquiry in effect is, if the conduct of the special road commissioner referred to in the first inquiry was

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not sufficient to constitute a violation of Secs. 61.300 and 61.310, then you desire us to point out any other section of the statutes which might be violated in that instance.

In a recent letter you gave us the additional information that the commissioner referred to in the opinion request was one of an eight-mile district, organized under provisions of Sec. 233.010 RSMo 1949. Secs. 233.010 to 233.165 RSMo 1949, are in regard to special city or town road districts in non-township organization counties. They contain territory not exceeding eight square miles, and are often referred to as special eight-mile districts.

Section 558.250 RSMo 1949, provides that, if any of the public officials therein named, in his official capacity shall wilfully and corruptly vote to allow any claim or demand for services not authorized by law, he shall be guilty of a criminal offense and punished in the manner provided therein. Said section reads as follows:

"Any member of the county court, common council or board of trustees, or officer or agent of any county, city, town, village, school township, school district, or other municipal corporation, who shall, in his official capacity, willfully or corruptly vote for, assent to or report in favor of, or allow or certify for allowance, any claim or demand, or any part thereof, against the county, city, town, village, school township, school district or other municipal corporation, of which he is such officer or agent, or against the county court, common council or board of trustees of which he is a member--such claim or demand, or part thereof, being for or on account of any contract or demand or service not authorized or made as provided or required by law--every such person so offending shall, on conviction, be punished by imprisonment in the penitentiary not more than five years, or by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment in the county jail not less than two nor more than twelve months, or by both such fine and imprisonment."

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Section 558.250 was formerly Section 4090 RSMo 1929, and in the case of State v. Holder, 335 Mo. 175, the defendant, a commissioner of a special road district, was charged by information with having violated said section.

The defendant was alleged to have presented his claim of \$17.00 for labor performed by him upon the roads of the district of which he was a commissioner, and corruptly voted to allow such claim and order same paid to him from the district's funds. It was further alleged that the demand and payment of same was not authorized or done as required by law.

The trial court sustained a demurrer to the information, which action was affirmed by the Supreme Court. In passing upon the sufficiency of the information, the court said at l.c. 180:

"Count five of the information does not disclose under what article of the statute the special road district was organized. We fail to find where the special road district law prohibits a member of the road commission from performing labor for hire upon the roads of his district other than the provisions of Section 8076, Article 10, Chapter 42. No such provision is found in Article 9 of Chapter 42, under which article special road districts may be organized. The only fact alleged in the information which tends to taint the claim with illegality is the fact that the claim was for services performed by the respondent. Since the road district law, under Article 9, Chapter 42, does not prohibit a member of the board of commissioners from receiving pay for labor performed outside of his official duties as a commissioner the section in question certainly cannot be construed to make the allowance of such a claim a felony. The allegation of the information that the services 'had not been authorized or done as provided or required by law' is a mere conclusion and is not of itself sufficient to charge respondent with a crime under the section in question. The information should set forth the facts rendering the claim illegal and should state in what manner the respondent corruptly voted for the allowance of an illegal claim.

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Taking all of the facts alleged in the information as true, exclusive of the conclusion pleaded, it does not charge a violation of Section 4090. The trial court was, therefore, correct in sustaining the demurrer to the latter three counts of the information."

No provisions of Secs. 233.010 to 233.165 RSMo 1949, dealing with special eight-mile road districts, provide that a commissioner who furnishes labor or material for the repair, building or maintenance of roads of his district, of which he is a member and in which contract he is pecuniarily interested and thereby contracts with himself, shall be deemed guilty of a criminal offense. Upon first thought it might appear that a commissioner, who contracts with himself in such manner, would be guilty of a criminal offense and subject to the penalty provided by Sec. 558.250, supra. However, in view of the conclusion reached in State v. Holder, supra, and as long as the commissioner, who contracts with the board of which he is a member, actually performs his part of the contract by furnishing the labor for building or repairing the roads, or furnishes tools or machinery, as agreed, and then votes to allow such claim and to pay himself for same, and it appears that funds of the district legally appropriated for that purpose are expended in payment of the claim, absent any fraud in the transaction, it is our thought that said commissioner will not have violated Sec. 558.250, supra, and he is not guilty of a criminal offense, even though he may have contracted with himself.

We are also unable to find any other sections of the statutes which said special road district commissioner would violate by his conduct in the manner referred to, therefore, our answer to your second inquiry is in the negative.

CONCLUSION

It is, therefore, the opinion of this department that a commissioner of a special city or town road district of a non-township organization county, organized under provisions of Secs. 233.010 to 233.165 RSMo 1949, who, in his individual capacity, sells material and labor for building and repairing the roads of the district to the commission of which he is a member, absent fraud, such transaction will not constitute a

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criminal offense, and said commissioner will not have violated Sec. 61.300 RSMo 1949, prohibiting certain officials to act as sales agent for compensation, or be pecuniarily interested in any contract of sale to the state, county or road district, of any tools, material or machinery for building or repairing any bridge, culvert or public road. Said commissioner not being guilty of violating any provisions of Secs. 61.170 to 61.300, he cannot be found guilty of a misdemeanor and punished in the manner prescribed by Sec. 61.310 RSMo 1949, nor in that event will he violate any other criminal statutes of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

PNC:ld:hw

NATIONAL PARKS:
PARKS:
FEDERAL JURISDICTION:
STATE JURISDICTION:
JURISDICTION:
JURISDICTION OF NATIONAL PARKS:

Sections 12.020, 12.010, and 95.525, RSMo 1949, cedes exclusive jurisdiction to the Federal Government of the George Washington Carver National Monument and the Jefferson National Expansion Memorial, only to the extent the federal government accepts said jurisdiction; and State of Missouri still retains jurisdiction over said two pieces of property.



March 6, 1957

Honorable James T. Blair, Jr.
Governor of Missouri
Jefferson City, Missouri

Dear Governor Blair:

Your immediate predecessor to the office of Governor requested an official opinion from this office, which reads as follows:

"The Department of Justice, through its local representative here, has requested that an opinion be obtained regarding the jurisdiction of the George Washington Carver National Monument and the Jefferson National Expansion Memorial, whether or not the jurisdiction of the State of Missouri has been exclusively ceded to the Federal government."

The George Washington Carver National Monument (hereinafter referred to as the Carver Monument) is located in southwest Missouri near Diamond. In 1943, Congress authorized and directed the Secretary of Interior to acquire the birthplace of George Washington Carver and lands surrounding. Sections 450 a.a. to 450 a.a.-2, Title 16, U.S.C.A. The area comprises 210 acres, and was condemned and purchased by the Federal government for \$80,000.00 in 1951. The statute says it shall be a national monument of the National Park Service and the Secretary of Interior shall have the supervision, management, and control of such monument.

The Jefferson National Expansion Memorial (hereinafter referred to as the Jefferson Memorial) is located at St. Louis on the river front. In 1935, Congress passed the "Historic Sites Act" which authorized the Secretary of Interior to purchase and create historic sites. Section 461-467, Title 16, U.S.C.A. By Section 450 j.j. to 450 j.j.-2, Title 16, U.S.C.A., the Jefferson Memorial was created as a historic site. In the same year, Executive Order No. 7253 directed the allocation from the Emergency Relief Appropriation Act \$6,750,000 for the purpose of purchasing the site, and the expenditure was made contingent upon the City

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of St. Louis, making available an additional sum, which it did in 1935. Sections 95.510, 95.515, and 95.520, RSMo. 1949, authorized St. Louis City to raise this additional sum.

It is pointed out in *Arledge v. Mabry*, 52 N. M. 303, 197 P. 2d. 884, that there are three principal methods by which the United States may acquire land within a state: First, the Constitutional method as provided by Clause 17, Section 8, Article I of the Federal Constitution; Second, by purchase without obtaining the consent of the state; and, Third, where the land acquired by the government was the property of the state, such acquisition being by a cession by the state to the Federal government in the nature of a gift. With respect to jurisdiction, different consequences follow acquisition under the three means permitted. Where land is acquired by the Constitutional method, the Federal government exercises exclusive jurisdiction over it with the exception that most states reserve the right of taxation and the right to serve civil and criminal process within said land. Where land is acquired by the other two methods, the Federal government may or may not have exclusive jurisdiction. This depends upon cession by the state and acceptance by the Federal government. It is wholly a matter of agreement between the two sovereign governments. These jurisdictional consequences we have just discussed are clearly set out in *Fort Leavenworth R. R. Co. v. Lowe*, 5 S. Ct. 995, 114 U.S. 525.

Thus, the problem here becomes one of whether, since the Federal government owns the Carver Monument and the Jefferson Memorial, does it have exclusive jurisdiction over them? More explicitly stated, the United States Constitution, Article I, Section 8, Clause 17, gives Congress power, among other things:

"To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; and"

From time to time, the Legislature has given its consent to such acquisitions by the Federal government by the enactment of the following laws (Sections 12.010 and 95.525, RSMo. 1949):

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"12.010. Consent given United States to acquire land by purchase for certain purposes.--The consent of the state of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this state which has been or may hereafter be acquired, for the purpose of establishing and maintaining post offices, internal revenue and other government offices, hospitals, sanatoriums, fish hatcheries, and land for reforestation, recreational and agricultural uses. Land to be used exclusively for the erection of hospitals by the United States may also be acquired by condemnation."

"95.525. United States granted authority to establish parks in state.--The consent of the state of Missouri is hereby fully given to the acquisition by the United States, or any qualified authority thereof, by purchase, grant or condemnation, of any lands or improvements thereon, in any of the cities to which sections 95.510 to 95.525 are applicable, for the purpose of establishing, improving in any manner, and maintaining any national park or plaza of the character described."

(Emphasis ours.)

It would appear that the Carver Monument and its surroundings would be "land for recreational uses" mentioned in Section 12.010, supra, and the Jefferson Memorial site would be the land mentioned in Section 95.525, supra, and Missouri has given its consent to the acquisition by the Federal government of exclusive jurisdiction of these lands. But this consent is ineffective under the constitutional method because the acquisition of lands for park purposes does not come within the seventeenth clause, Section 8, Article I of the Constitution of the United States. This is made clear in *Collins v. Yosemite Park Co.*, 58 S. Ct. 1009, 304 U.S. 518, at page 529, where it says:

"* * * The United States has large bodies of public lands, These properties are used for forests, parks, ranges, wild life sanctuaries, flood control, and other purposes which are not covered by clause 17. * * *

(Emphasis supplied.)

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Thus, the United States holds these lands as any other proprietor, unless Missouri has ceded jurisdiction in some other way. In U.S. v. Penn., 48 F. 669, at page 670, Judge Hughes says:

"The purchase of lands for the United States, for public purposes, does not of itself oust the jurisdiction of such state over the lands purchased. * * * The constitution prescribes the only mode by which they can acquire land as a sovereign power; and therefore they hold only as an individual when they obtain it in any other manner. * * * If there is no cession by a state, the state jurisdiction still remains. * * *."

Section 12.020, RSMo. 1949, provides as follows:

"The jurisdiction of the state of Missouri in and over all such land purchased or acquired as provided in Section 12.010 is hereby granted and ceded to the United States so long as the United States shall own said land; provided, that there is hereby reserved to the state of Missouri, unimpaired, full authority to serve and execute all process, civil and criminal, issued under the authority of the state within such lands or the buildings thereon."

It would appear that this section is a cession or a grant by the state to the Federal government of exclusive jurisdiction over Carver Monument and Jefferson Memorial. We hold, however, that this cession is effective only to the extent the Federal government accepts. The latter has not expressly accepted such exclusive jurisdiction, so only has that jurisdiction which will enable it to carry out the purposes for which it acquired the two pieces of land. See Arlington Hotel v. Fant, 49 S. Ct. 227, 278 U.S. 439; Howard v. Commissioners of Sinking Fund of City of Louisville, Ky., 73 S. Ct. 465, 344 U.S. 624. In Mason Co. v. Tax Commission, 58 S. Ct. 233, 302 U.S. 186, at page 207, the court had the following to say:

"* * * Even if it were assumed that the state statute should be construed to apply to the federal acquisitions here involved, we should still be met by the contention of the Government that it was not compelled to accept, and has not accepted, a transfer of exclusive jurisdiction. As such a transfer rests upon a grant by the State, through consent or cession, it follows, in accordance with familiar principles applicable to grants, that the grant may be

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accepted or declined. Acceptance may be presumed in the absence of evidence of a contrary intent, but we know of no constitutional principle which compels acceptance by the United States of an exclusive jurisdiction contrary to its own conception of its interests. The mere fact that the Government needs title to property within the boundaries of a State, which may be acquired irrespective of the consent of the State (Kohl v. United States, 91 U.S. 367, 371, 372), does not necessitate the assumption by the Government of the burdens incident to an exclusive jurisdiction. We have frequently said that our system of government is a practical adjustment by which the national authority may be maintained in its full scope without unnecessary loss of local efficiency. In acquiring property, the federal function in view may be performed without disturbing the local administration to matters which may still appropriately pertain to state authority. In our opinion in *James v. Dravo Contracting Co.*, supra, we observed that the possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the Government expand and large areas within the States are acquired. And we added that there appeared to be no reason why the United States should be compelled to accept exclusive jurisdiction or the State be compelled to grant it in giving its consent to purchases."

It follows that if the Federal government has not accepted exclusive jurisdiction over the Carver Monument and the Jefferson Memorial, the State of Missouri retains that jurisdiction not accepted. We might treat Section 12.020, supra (wherein Missouri cedes jurisdiction), as a continuing offer by the State of Missouri to the Federal government to accept exclusive jurisdiction, because said section shows it was the intent of the legislature to cede all jurisdiction over the lands mentioned.

To further buttress this proposition, we hold that a fair interpretation of the two federal acts authorizing the acquisition of the Carver Monument and the Jefferson Memorial does not convey the idea that it was the intent of the Federal government to acquire exclusive jurisdiction over said two pieces of property.

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See Johnson v. Morrill, Calif. Sup., 126 P. 2d 873. Also, we call your attention to Section 465 of the "Historic Sites Act" which authorized the acquisition of the Jefferson Memorial. It reads as follows:

"* * * Nothing in sections 461-467 of this title shall be held to deprive any state, or political subdivision thereof of its civil and criminal jurisdiction in and over lands acquired by the United States under sections * * *."

There is similar language in the Lanham Act and the Supreme Court of California in Johnson v. Morrill, supra, at page 877, held such language amounted to an express refusal by the Federal government to take exclusive jurisdiction over the land it acquired.

We also call your attention to Section 255, Title 40, U.S. C.A., being revised Statutes Section 355, as amended, which is not in the sections establishing the Carver Monument or the Sections creating the Jefferson Memorial, wherein it specifically provides in paragraph 8 thereof that "notwithstanding any other provision of law" it is not required that the United States obtain exclusive jurisdiction and that no such exclusive jurisdiction will be presumed unless the head or other authorized officer of any department, agency, etc. of the government shall consent to the cession of such exclusive jurisdiction, and indicates its consent by filing a notice thereof with the governor of the state in which the land is located. It appears that no such accepting of jurisdiction has taken place in connection with the Carver Monument or the Jefferson Memorial.

CONCLUSION

It is therefore the opinion of this office that Sections 12.020, 12.010, and 95.525, RSMo. 1949, which attempt to cede exclusive jurisdiction to the Federal government over the George Washington Carver National Monument and the Jefferson National Expansion Memorial, are effective only to the extent the Federal government accepts said exclusive jurisdiction; and since the Federal government has not accepted exclusive jurisdiction, the State of Missouri still retains jurisdiction over said two pieces of property.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, George E. Schaaf.

Yours very truly,

JOHN M. DALTON
Attorney General

CRIMINAL LAW: Sentence to hang should be modified to conform to present punishment for death. Any delay in executing death sentence against Barbata from 1944-1957 does not prevent executing sentence at this time.
PUNISHMENT:
GOVERNOR:



April 26, 1957

Honorable James T. Blair, Jr.
Governor, State of Missouri
Jefferson City, Missouri

Dear Governor Blair:

This will acknowledge receipt of your request relative to the case of Paul Barbata who was convicted in the Circuit Court of St. Louis and sentenced to hang. This sentence was affirmed by the Supreme Court on appeal and his execution was stayed by Governor Guy D. Park. Thereafter, in 1935, Governor Park suspended the execution for the reason that Barbata had become insane and such suspension of the execution was declared to be in full force and effect until restored to reason. He was placed in State Hospital No. 1 in Fulton, Missouri. Thereafter, on March 22, 1957, your office was informed by the Superintendent of said Hospital that Barbata was of sound mind.

You request an opinion on the following:

"(1) How, at this late date, and in what court, can the sentence to death by hanging be modified so as to order death in the lethal gas chamber?

"(2) Does the dereliction of the authorities of this State in not exacting execution of the sentence during the period 1944-1957, elapsing since Barbata's restoration to sanity, preclude execution of the sentence at this time?"

This Department, under date of October 18, 1941, rendered a very comprehensive opinion to Honorable Michael W. O'Hern, Prosecuting Attorney of Jackson County, Missouri, relative to a similar situation wherein Ferdinand Brockington's conviction and sentence were suspended for similar reasons. He was also sentenced to hang. However, during his recovery, the law providing the death penalty by hanging was repealed and a statute enacted in lieu thereof providing that when the

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death penalty is assessed the convicted prisoner shall be executed by lethal gas. We are enclosing a copy of this opinion which holds in part that a motion to modify the original judgment in the Supreme Court shall be filed by this Department, that the circuit judge must resentence said defendant upon receipt of the mandate of the Supreme Court.

Thereafter, on September 8, 1944, this Department rendered an opinion to Forrest C. Donnell, Governor of the State of Missouri, on the particular manner of executing the death sentence against this same Barbata, a copy of which we are enclosing. Said opinion holds in part that the Governor should issue a warrant specifying the time of execution pursuant to such modified sentence as the circuit court of the City of St. Louis or the Supreme Court may order; that the prosecuting attorney of the City of St. Louis should thereupon proceed under the provisions of Sections 4110 and 4111, RSMo 1939 (546.700 and 546.710, RSMo 1949) to have the prisoner brought before one of the courts named in Section 4110, RSMo 1939; that such court thereupon shall issue a warrant to the warden of the State of Missouri for execution of the prisoner; that such court would have to modify the judgment and sentence so that said warrant would direct the execution of the death sentence in accordance with Sections 4112 and 4113, RSMo 1939 (546.720 and 546.730, RSMo 1949).

We are of the opinion that the foregoing conclusion reached in said opinion is still the law and in full force and effect, with this one exception that under Section 56.450, RSMo 1949, the circuit attorney in the City of St. Louis is required to conduct all criminal cases in which the circuit court of the City of St. Louis shall have jurisdiction. Therefore, in view of the fact this involves a felony it becomes the duty of the circuit attorney to proceed in this matter instead of the prosecuting attorney as held in the attached opinion.

We shall now consider your second inquiry. Your request does not indicate the nature of the dereliction of the authorities of this State in not exacting execution of the sentence against Barbata from 1944 to 1957. However, subsequent to the receipt of your request you submitted a photostatic copy of a letter addressed to you under date of March 22, 1957, from the Superintendent of State Hospital No. 1 in Fulton, Missouri, wherein Barbata has been placed for treatment, which letter clearly indicates that the Hospital record since 1944 is replete with reference made to the fact that Barbata is fully sane; that the Superintendent of said Hospital did on two occasions request Barbata be discharged from the Hospital; that on April 20, 1956, one of the psychiatric consultants

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at the Hospital examined Barbata and the diagnosis showed no mental disease. The Superintendent of the Hospital, in said communication, recommends that Barbata be discharged as set forth at the time of commitment twenty-two years ago.

Why Barbata has not heretofore been discharged and the original sentence executed is not at this time a matter for determination by this office. This was a matter within the discretion of the respective governors of the State. It would be possible that they were not satisfied as to Barbata's complete recovery. As stated in the enclosed opinion rendered in 1944, the law is absolutely silent as to how the Governor shall determine when such persons regain sanity. We do not have any knowledge as to whether any further examinations were made to determine Barbata's recovery, or, if made, what they contained. However, We do believe that any failure to discharge Barbata, and execution of his sentence under the law, when declared by the Superintendent of the Hospital that he was no longer mentally ill, does not bar the execution of this sentence at this time.

Barbata's sentence was suspended by the Governor under and by virtue of Article V, Section 8, Constitution of Missouri, and Section 549.049, RSMo 1949. The foregoing statute provides in part that if the sentence is suspended by the Governor it shall be executed upon him after such period of suspension has expired. There is nothing to indicate that the execution is barred if he is not executed immediately upon recovery.

The St. Louis Court of Appeals in *Weber v. Mosley*, 242 S.W. 2d. 273, in a very exhaustive opinion, cites and discusses at great length numerous appellate court decisions in this and other jurisdictions on this particular question of law. In the above case, the court held that the essence of the judgment is the kind and amount of punishment inflicted and the judgment is satisfied only by undergoing the punishment inflicted in the absence of a remitter by the sovereign or absolved by death, and that the expiration of time alone without incarceration is not tantamount to the execution of the sentence. The court further held that estoppel cannot apply against the State as a result of lapse of time after commitment has issued and before it is actually executed by reason of a remiss of the duty of a ministerial officer any more than any other holding would permit such officers to thwart and nullify the judgments of courts. We believe the same reasoning is applicable to all officers and not only ministerial officers. In so holding the court said:

"(16,17) There is no statute of limitations on the enforcement of criminal judgments imposing jail sentences. Ex parte Bugg, supra. Nor can any estoppel work against the state as a result of the lapse of time after a commitment has issued and before it is actually executed

Honorable James T. Blair, Jr.

by reason of the fact that a ministerial officer has been remiss in his duty. Any other holding under the facts in the case at bar would permit ministerial officers to thwart and nullify the judgment of courts.

"The relief for the hapless person described by the writer of the opinion in *Ex parte Bugg*, supra, 145 S.W., loc Cit. 832, is an appeal to the department of government which has the power to grant clemency. It is not for this court to usurp that power."

In the enclosed opinion relative to this particular case, will be found a citation from *Lime v. Blagg*, 131 S.W. 2d. 583, l.c. 585, holding that a mere reprieve by the governor, as in the case at bar, merely postpones sentences and cannot defeat the ultimate execution of the judgment of the court, but merely delays it.

There are several authorities cited in Volume 34, A.L.R. 314-317 as well as Volume 49 A.L.R. 805-813 that discusses the proper procedure for suspending sentences and holding that the postponement or suspension of sentences does not discharge the defendant. Furthermore, that the failure of the sheriff or other officials in carrying out the death sentence on a fixed day, whether due to forgetfulness, inadvertence or wilful negligence of duty, does not discharge the defendant, that a new day may be set for an execution.

Apparently Barbata at no time subsequent to the time of his sentence and his confinement at the hospital, personally made any appeal to the proper authorities disclosing the fact that he was now sane and requesting that he be discharged from said Hospital. It would seem absurd to contemplate that he would do so for the reason that this would most certainly have brought the matter to a head and the judgment of death forthwith satisfied. We mention this merely for the reason that there are decisions indicating that if defendant makes a request to have a judgment satisfied and this is denied, that it might amount to the satisfaction of the judgment. However, needless to say none of these decisions are death cases.

It certainly cannot be argued that by reason of the delay in his execution that he has been harmed. Had the suspension been revoked by the Governor upon finding that he was restored to sanity, then he would have been executed without any further delay.

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In view of the foregoing, assuming for the sake of this opinion only, that there was dereliction of the authorities in failing to exact execution of the sentence, we still believe this does not preclude execution of the sentence at this time.

CONCLUSION

It is the opinion of this department that a motion to modify the original sentence against Barbata should be filed by this department in the Circuit Court of St. Louis or the Supreme Court of Missouri.

It is the further opinion of this department that any failure to exact the execution of the sentence against Barbata from 1944-1957, does not preclude the execution of the sentence at this time.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

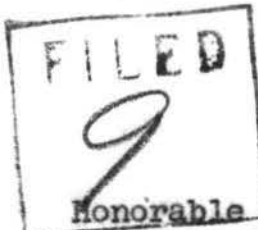
John M. Dalton
Attorney General

Enc. (2)

ARH:b1/mw

GENERAL ASSEMBLY:
CONSTITUTION:
STATUTES:

When a bill is finally passed by both houses of the General Assembly and approved by the governor, the constitutionality of the resulting law cannot be successfully challenged on the ground that the presiding officer of the Senate failed to sign the bill.



June 17, 1957

Honorable James T. Blair, Jr.
Governor of Missouri
Jefferson City, Missouri

Dear Governor Blair:

This refers to your letter of June 11, 1957, requesting a formal opinion of this office, which letter reads as follows:

"There have been presented to me for my consideration and action certain bills which were passed by both Houses of the General Assembly, but which were not signed by the presiding officer of the Senate. These bills are

H.C.S.H.B. No. 10
H.B. No. 207
H.B. No. 208
H.B. No. 288
H.B. No. 442
H.B. No. 570
H.B. No. 364
H.B. No. 77

"Your opinion is requested with respect to the question whether, in the event that I approve such bills, the fact that they were not signed by the presiding officer of the Senate will cause them not to be validly enacted laws."

The question presented by you arises by reason of provisions of Section 30 of Article III of the Constitution of Missouri with respect to the signing of bills by the presiding officer of each house of the General Assembly. This section of the Constitution, and Section 31, which must be considered with it, read as follows:

"Section 30. Signing of bills by presiding officers - procedure on objections - presentation of bills to governor.- No bill shall become a law until it is signed by the presiding officer of each house in open session, who first shall suspend all other business, declare that the bill

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shall now be read and that if no objection be made he will sign the same. If in either house any member shall object in writing to the signing of a bill, the objection shall be noted in the journal and annexed to the bill to be considered by the governor in connection therewith. When a bill has been signed, the secretary, or the chief clerk, of the houses in which the bill originated shall present the bill in person to the governor on the same day on which it was signed and enter the fact upon the journal."

"Section 31. Governor's duty as to bills and joint resolutions - time limitations.- All bills and joint resolutions passed by both houses shall be presented to and considered by the governor, and within fifteen days after presentation he shall return them to the house of their origin endorsed with his approval or accompanied by his objections. If the bill be approved by the governor it shall become a law. When the general assembly adjourns, or recesses for a period of thirty days or more, the governor may return within forty-five days any bill or resolution to the office of the secretary of state with his approval or reasons for disapproval."

While somewhat similar questions have been considered by courts in other states, we believe that our opinion in this matter must be based entirely upon the views expressed by the Missouri Supreme Court en banc in its opinion in the case of *Brown v. Morris*, 290 SW2d 160, decided in 1956. In that case, the constitutionality of the law providing for the cigarette tax was challenged on the ground that the Speaker of the House of Representatives had refused to sign the bill which resulted in such law. That bill had provided for its submission to the voters of the state at a referendum election, and the bill had been approved at such election before the suit was filed.

The precise decision of the Supreme Court was that the failure of the Speaker to sign the bill was a procedural defect or error which had been cured by the approval of the voters at the referendum election. However, in its opinion, the court discussed in considerable detail the question whether the constitutional provision with respect to signature by the presiding officer was mandatory or directory, and concluded that it was directory only.

After referring to decisions in other states, the court stated:

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"* * * Extended discussion of these cited cases is unnecessary, however, because of material changes made by the 1945 Constitution in the legislative article. Old § 38, Art. IV, provided that 'When the bill has been signed [by the presiding officers], as provided for in the preceding section' it shall be presented to the governor and if approved by him it 'shall become a law.' The revised section, now § 31, Art. III, provides: 'All bills and joint resolutions passed by both houses' shall be presented to the governor and when approved by him 'shall become a law.' (Emphasis ours.) It will be noted that the language 'passed by both houses' has been substituted for 'when the bill has been signed' as a prerequisite for presentation of the bill to the governor for consideration.* * * *

"Thus it affirmatively appears from § 31 of Art. III of the present constitution that passage of a bill by the general assembly plus its approval by the governor produces a validly enacted law.* * * What constitutes final passage of a bill is defined by § 27 as follows: '* * *, nor shall a bill be finally passed, unless a vote by yeas and nays be taken and a majority of the members elected to each house be recorded as voting favorably.' It will be noticed that this definition of passage does not include signing by the presiding officers.

"We should undertake to harmonize and give effect to all constitutional provisions, but in doing so we cannot read into § 31 the requirement of § 30 that the bill be signed by the presiding officer because in so doing we would be restoring to the section a provision which was specifically eliminated when the new constitution was adopted.* * * "

At another place in its opinion, the court stated:

"Section 31 clearly provides that constitutional requirements for action by the legislative body have been met when a bill has 'passed both houses' of the general assembly. The bill is then ready for consideration by the executive or the voters on referendum. Section 31 is a complete formula and its provision that a bill shall become a law when its terms are satisfied is positive and mandatory. If § 30 is

Honorable James T. Blair, Jr.

construed to mean that signing by the presiding officer is also mandatory and the sine qua non of a valid bill, then a conflict with § 31 would exist."

The court then went on to explain why it believed that the provision of Section 30, with respect to signing by the presiding officers, should not be considered mandatory and, therefore, in conflict with the provisions of Section 31. In this connection, the court pointed out that the only purpose of the signatures, namely, authentication of bills, can be otherwise accomplished. With respect to this, the court stated:

"Section 31 makes it clear that the indispensable step is final passage and it follows that if a bill, otherwise duly enacted as a law, is not attested by the presiding officer, other proof that it has 'passed both houses' will satisfy the constitutional requirement. Sutherland Statutory Construction, 3rd Ed., Vol. I, p. 221, § 1304, advances this reasoning as to the function and necessity of the signature of the presiding officer: 'In sum the signature of the presiding officer is only a certificate to the governor that the bill has passed the requisite number of readings and has been adopted by a constitutional majority of the house over which he presides. If this information is available to the governor and to the courts by journals which are recognized admissible in evidence, the procedural protections set by the constitution have been complied with, and the bill should be enforceable as a properly enacted statute.'

"In Missouri, legislative journals are not only admissible in evidence but the courts may judicially notice the history of legislation as reflected by the record thereof in the legislative journals. State ex rel. Karbe v. Bader, 336 Mo. 259, 78 S.W.2d 835. It is quite apparent that neither the governor nor the courts are dependent upon the certificate of the presiding officer. They may determine from the legislative journals whether a bill has 'passed both houses.' * * *

Without quoting further from the court's opinion, the views expressed therein may be briefly summarized as follows: The constitutional requirement for signature by the presiding officers of the House and Senate is directory, rather than mandatory; the only purpose of the requirement is to provide a mode of authentication

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evidencing the fact that a particular bill has been passed in due form by the legislative body involved; in the absence of signatures, other proof of passage will satisfy the requirement and such proof may be provided by the legislative journals; and the only requirements for a valid law are final passage of a bill by the House and Senate (which does not include signature by the presiding officers) and approval by the governor or by the voters on referendum.

While the situation now presented differs somewhat from that in *Brown v. Morris* because no referendum is involved, it is believed that, in the light of the views so recently expressed by the Supreme Court in that case with respect to the pertinent constitutional provisions and the nature of the requirement with respect to signatures by the presiding officers, it must be concluded that, in the event you approve the bills in question, their constitutionality could not be successfully challenged because the presiding officer of the Senate failed to sign them.

CONCLUSION

It is the opinion of this office that, when a bill is finally passed by both houses of the General Assembly and approved by the governor, the constitutionality of the resulting law cannot be successfully challenged on the ground that the presiding officer of the Senate failed to sign the bill.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Baumann.

Very truly yours,

John M. Dalton
Attorney General

JCB/ld

CS op 39, May 28, 1952, Henson

TAXATION:
COUNTY COURTS:

The county court has no authority to relieve the collector from the collection of penalties and interest due on account of delinquent taxes.



October 31, 1957

XXXXXXXXXX

W. H. Ritzenthaler

Honorable Clay Cantwell
Prosecuting Attorney
Taney County
Forsyth, Missouri

Dear Mr. Cantwell:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"The County Court of Taney County has requested me to write to you for a ruling pertaining to a tax matter here in the county.

"In October, 1956, the State Tax Commission ordered a reduction in the assessed valuation of property in Taney County, Missouri, consisting of Powersite Dam and other real estate belonging to the Empire District Electric Company. This order of reduction was made after the County Collector's tax books had been made up.

"In December of 1956, Empire District Electric Company tendered payment of the tax based upon the reduced valuation. This tender of payment was refused by the Collector pending the outcome of a lawsuit filed in November by Taney County contesting the validity of the reduction made by the State Tax Commission.

"In April of this year the Circuit Court upheld the reduction made by the tax commission and there is an appeal now pending * * *. In June of this year Taney County and Empire District Electric Company entered into the stipulation

Honorable Clay Cantwell

whereby the electric company agreed to pay and Taney County agreed to accept the tax based upon the reduction made by the tax commission; the stipulation is to be without prejudice to the appeal made by Taney County.

"My question is as follows: based upon the above facts what order or orders should the Taney County Court make so that the County Collector should accept the tax money without being charged with penalties and interest."

Under the above stated factual situation, you inquire as to what order or orders the Taney County Court should make so that the county collector can accept the taxes based upon the assessed valuation fixed and determined by the State Tax Commission without being charged with penalties and interest.

Section 140.010, RSMo 1949, provides that all real estate upon which the taxes remain unpaid on the first day of January shall be deemed delinquent. Section 139.100, RSMo 1949, provides that if a taxpayer shall fail or neglect to pay to the collector his taxes on or before January 1, then it shall be the duty of the collector after the first day of January to "collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in section 140.100."

Section 140.100, RSMo 1949, provides as follows:

"1. Each tract of land in the back tax book, in addition to the amount of tax delinquent, shall be charged with a penalty of ten per cent of each year's delinquency except that the penalty on lands redeemed prior to sale shall not exceed one per cent per month or fractional part thereof or ten per cent annually.

"2. For making and recording the delinquent land lists, the collector and the clerk shall receive ten cents per tract or lot and the clerk shall receive five cents per tract or lot for comparing and authenticating such list."

The Supreme Court of Missouri, in the case of State v. Fendorf, 317 Mo. 579, 296 S.W. 787, held that under the above

Honorable Clay Cantwell

referred to sections it is the duty of the collector, beginning on January 1, to collect the penalties and interest provided.

Thus, it is seen that the imposition of penalties and interest on account of delinquent taxes is a matter provided for and regulated by statute.

With the possible exception of Section 140.120, RSMo 1949, which, under the factual situation recited is not in our opinion applicable, we are unable to find any statutory authority permitting the county court to relieve the collector from the collection of penalties and interest on delinquent taxes.

Section 7, of Article VI of the Missouri Constitution provides for a county court to manage all county business "as prescribed by law." The appellate courts of this state, in referring to the power and authority of the county courts, have repeatedly held that such bodies can only exercise such powers as are expressly given by statute. *Arbyrd Compress Co. v. City of Arbyrd*, 246 S.W.2d 104, 109; *Bradford v. Phelps County*, 357 Mo. 830, 210 S.W.2d 996, 999.

Under the above recognized rule and in the absence of any such authority granted by law, we are of the opinion that the county court does not possess the power or authority under the circumstances here presented to relieve the collector from the collection of penalties and interest due on account of delinquent taxes.

CONCLUSION

It is, therefore, the opinion of this office that in the absence of a showing that a tract of land is not worth the amount of taxes, interest and costs thereon, the county court has no authority to relieve the county collector from the collection of penalties and interest due on account of delinquent taxes.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

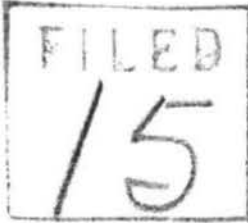
Very truly yours,

John M. Dalton
Attorney General

DDG:hw

OFFICERS:
KANSAS CITY BOARD OF
ELECTION COMMISSIONERS:

Subsection 4 of Section 117.050, RSMo, requires the Kansas City Board of Election Commissioners to keep its office open during business hours of each week day, excluding Sundays and legal holidays. Board is unauthorized to close its office Saturday afternoon of each week.



January 7, 1957

Honorable David T. Cavanaugh
Member, Board of Election Commissioners
1331 Locust Street
Kansas City 6, Missouri

Dear Mr. Cavanaugh:

This will acknowledge receipt of your recent opinion request dated November 26, 1956, inquiring as to what constitutes business hours with particular reference to Saturdays, within the meaning of Section 117.050, subsection 4, RSMo. 1949.

In reply, we advised you that we were enclosing a copy of our opinion written to Honorable James G. Lauderdale, Probate Judge of Lafayette County on March 15, 1951, which said opinion concluded that county offices must be kept open all day each week except Sunday and legal holidays, and it was believed to fully answer the inquiry. We now are in receipt of your more recent letter acknowledging receipt of said opinion, and note you state that since the opinion refers to county offices, you desire our opinion as to whether or not the Board of Election Commissioners, would be designated as state, county or city offices within the meaning of our former opinion to Judge Lauderdale. Your last opinion request reads:

"As you know, the Board of Election Commissioners of Kansas City, Missouri operates under the provisions of Chapter 117, (Section 117.010 to Section 117.900 inclusive) Election Laws of Missouri. The members of the Board of Election Commissioners are appointed by the Governor pursuant to Sec. 117.050, and the expenses of operation and maintenance of such office of the Election Commissioners is paid one-half by Jackson County, Missouri and one-half by Kansas City, Missouri as provided by Section 117.140.

"By reason of the peculiar situation relative to the appointment of the commissioners and payment of expenses of the Election Board, the question arises as to whether or not the Board of Election Commissioners of Kansas City, Missouri would be designated as a 'county office' within the meaning of the legal opinion heretofore mentioned.

Honorable David T. Cavanaugh

"We would appreciate it if you would advise us whether the Board of Election Commissioners of Kansas City, Missouri would be designated as a 'county office' within the meaning of the opinion heretofore mentioned, or whether it is a 'state office,' or a 'city office' of Kansas City, Missouri."

It is believed that while the conclusion reached in the enclosed opinion referred only to county offices, that same is not confined to county offices but is equally applicable to state and city offices and would include that of election commissioners.

Inasmuch as you desire an opinion referring only to the election commissioners, we shall be happy to write one for you on the original inquiry. We assume that you are more interested in the original question posed than the inquiry as to the kind of office a commissioner holds.

Said opinion request reads as follows:

"With reference to Section 117.050(4), Election Laws of Missouri, revised for 1955-56, quoted below, this Board respectfully requests an opinion from you in regard to said section.

'Section 117.050..... 4. Such board of commissioners shall maintain an office sufficient for the purpose of such board, which shall always be kept open during business hours of every day, Sundays and legal holidays (other than election days) excepted.'.....

"We would like to have your opinion of what constitutes 'business hours', with particular reference to Saturdays.

"At present, apparently in the discretion of some former board, our office is regularly open from 8:30 a.m. to 4:30 p.m. Monday through Friday, and from 8:30 a.m. to 12 noon on Saturdays.

"We will certainly appreciate your usual prompt attention and cooperation in this matter."

Section 117.050, RSMo. 1949, refers to Boards of Elections Commissioners of cities having 300,000 but not over 700,000 inhabitants and includes Kansas City, Missouri in that class. Subsection 4, thereof, requires the Board to keep an office for the purposes of the Board and provides when it shall be opened for business. Said subsection reads:

Honorable David T. Cavanaugh

"4. Such board of commissioners shall maintain an office sufficient for the purpose of such board, which shall always be kept open during business hours of every day, Sundays and legal holidays (other than election days) excepted."

The above subsection does not state the time when the office shall be opened nor when it shall close. While it does provide the office shall be kept open during business hours of every day, except those referred to, it fails to define what are business hours within the meaning of the subsection. We are unable to find any Missouri statutes or appellate court decisions defining said terms, therefore, we must look elsewhere for a suitable definition.

While an exact definition was not given which would be applicable to the facts involved in every situation, it is believed, that the one given in the case of *Casaldue v. Diaz et al.* (C.C.A. 1st Circuit) 117 Fed. (2d) 915, would be more nearly applicable than any other we have found thus far. In that case the court construed a certain Federal rule of civil procedure, requiring the clerk's office to be open during business hours of every day except Sundays and legal holidays and at l.c. 916 the Court said:

"It is contended that Rule 41 of the District Court providing that on Saturday the clerk's office shall be kept open until noon is in conflict with Rule 77(c) of the Federal Rules of Civil Procedure. Rule 77(a) and (c) reads:

* * * * *

"(c) Clerk's office and Orders by Clerk. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays.
* * *

"The term 'business hours' is not defined in the rule. In its natural sense, the term means those hours during which persons in the community generally keep their places open for the transaction of business. The long usage in Puerto Rico, as in many other places, is that business hours on Saturdays do not extend to the afternoon.
* * *

Honorable David T. Cavanaugh

It is noted the court found that according to long usage in Puerto Rico and other places, business hours on Saturdays did not include Saturday afternoons and it was the custom that the public did not transact business on Saturday afternoons, and under the Federal rule, business hours also did not include Saturday afternoons.

From your first letter, it appears that the office of the Board is opened regularly from 8:30 a.m. to 4:30 p.m., Monday through Friday and from 8:30 a.m. to 12:00 noon on Saturdays. While there are no statutory provisions as to what hours the Board's office shall be opened and closed each day, we are not advised if the hours mentioned are in accordance with local custom regarding business hours, particularly Saturday afternoon. However, we are advised that the opening and closing hours were apparently established in the discretion of some former Board and that such hours are being observed by the Board at the present time.

In the absence of any showing that it is the local custom for business hours not to include Saturday afternoon, we cannot assume such to be the case and that business hours on Saturday are the same as those on any other day of the week excluding Sundays and all legal holidays. We call your attention to the following sections of the Revised Statutes of Missouri 1949, naming those holidays which have been designated by law.

Sections 10.010, 10.020, 10.030, and 10.050 read as follows:

"Sec. 10.010. The following days, namely: The first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, any general primary election day, any general state election day, any thanksgiving day appointed by the President of the United States or by the governor of this state, and the twenty-fifth of December, are hereby declared and established public holidays; and when any of such holidays falls upon Sunday, the Monday next following shall be considered such holiday."

"Sec. 10.020. The twelfth day of October of the year of our Lord 1909, and the twelfth day of October of each year thereafter, is hereby declared a public holiday, to be known as 'Columbus Day,' and the same shall be recognized, classed and treated as other legal holidays under the laws of this state; provided,

that this section shall not be construed to affect commercial paper, the making or execution of agreements or instruments in writing or interfere with judicial proceedings."

"Sec. 10.030. The thirteenth day of April of the year 1932, and the thirteenth day of April of each year thereafter is hereby declared a public holiday to be known as 'Jefferson Day,' and the same shall be recognized, classed and treated as other legal holidays under the laws of this state; provided, that this section shall not be construed to affect commercial paper, the making or execution of agreements or instruments in writing, or to interfere with judicial proceedings."

"Sec. 10.050. The twelfth day of February of the year 1916, and the twelfth day of February of each year thereafter, is hereby declared a public holiday, to be known as 'Lincoln Day,' and the same shall be recognized, classed and treated as other legal holidays under the laws of this state; provided, that this section shall not be construed to affect commercial paper, the making or execution of agreements or instruments in writing, or to interfere with judicial proceedings."

It is believed that the Kansas City Board of Election Commissioners would be authorized to close its office on each of the holidays named in the foregoing statutes, but since Saturday, or the 6th day of each week, nor any part of it, has not been designated as a legal holiday by the lawmakers said Board should keep its office open all day of each Saturday. It is further believed that "business hours" within the meaning of subsection 4 of Section 117.050, supra, includes Saturday afternoons and that Saturday afternoon is also included within the business hours of each day for transacting business within the Kansas City area.

CONCLUSION

It is, therefore, the opinion of this Department that under the provisions of Section 117.050, subsection 4, RSMo. 1949, the Kansas City Board of Election Commissioners is required to keep their office open during business hours of each day of the week, excluding Sundays and legal holidays, and that the usual business hours of the people located within the Kansas City area include all day Saturday and the Board is unauthorized to close its office each Saturday afternoon.

Honorable David T. Cavanaugh

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PHC/mm/bi

DIVISION OF WELFARE:
LICENSING MASONIC
HOME OF MISSOURI:
CHILDREN:



There is no duty or responsibility of the State Division of Welfare to require a license nor to inspect that portion of the Masonic Home of Missouri devoted to the caring for children, because the Home neither advertises nor holds itself out as conducting a boarding house or place of residence for children.

June 21, 1957

Honorable Proctor N. Carter, Director
Division of Welfare
State Office Building
Jefferson City, Missouri

Dear Mr. Carter:

In your letter of the twentieth of March, 1957, you wrote us as follows:

"A question has arisen as to the duty or responsibility of the State Division of Welfare to license and inspect that portion of the Masonic Home in St. Louis, City, Missouri, that is devoted to caring for children under the provisions of Chapter 210, Laws of Missouri 1955.

"It is my understanding that approximately thirty children are cared for in the Masonic Home in St. Louis who are unattended by parent or legally appointed guardian.

"We would appreciate receiving an opinion from you as to whether or not that portion of the Masonic Home devoted to the care of children should be licensed as a boarding home for children under the provisions of Chapter 210, supra."

You will recall that on the twenty-second of March we wrote you that we were going to meet with the Board at the Masonic Home and get the facts regarding the Home as they pertain to the children before attempting to answer your request. This, of course, was necessary in view of the fact that neither your division nor our department had any facts upon which an opinion could be based.

Honorable Proctor N. Carter

The Masonic Home for Missouri has been set up as a separate corporation for the management of the Home. It is, of course, a nonprofit corporation. There is no charge against any parent or guardian. In one or two cases voluntary contributions are made or have been made by a parent or guardian. The Home was established for a home for the Masons of Missouri or for their widows or other dependents. The admission of children whose fathers are not or were not Masons has been approved in some instances.

Neither the Home nor the local lodge guarantees anyone the right to apply for admission. The admission of a child to the Home can only be had upon the petition of some lodge who feels a responsibility to help some individual or some child. The Home acts for the Lodge in the care of the guests of the Home. Some lodges take care of charity cases at home and some request help at the Masonic Home.

The local lodge, at its request, can take a child from the Home at any time it deems proper. In one or two instances the superintendent of the Home has been the guardian of a child.

The Masonic Home does not and, of course, lawfully cannot, let out or attempt to let out a child to foster parents or for adoption. The Masonic Home furnishes the facilities, supervisory staff, and all things necessary for the physical, moral, mental and spiritual growth of the child, and to assist the local lodges properly in taking care of their charity cases, for which they are not equipped. No one, Mason or non-Mason, can petition the Home directly for admission. The Home will not assure any local lodge that they will take all or any particular person, adult or child.

Section 210.201, RSMo, Cumulative Supplement 1955, defines "Boarding home for children" as follows:

"(1) 'Boarding home for children' shall be held to mean a house or other place conducted or maintained by any person who advertises or holds himself out as conducting, for compensation or otherwise, a boarding house or place of residence for one or more children who are unattended by parent or legally appointed guardian, except day care homes or

Honorable Proctor N. Carter

day nurseries as defined in sections
210.201 to 210.245."

Of course, in the present instance, there is positively no advertising by the Home under any definition of that word.

The words "holds himself out" or similar words or phrases such as "holds itself out," "holds out," "holding out," have quite often been used in statutory provisions pertaining to licenses in various fields or professions.

In the case of *People v. Hubbard*, 145 N.E. 93, there was an interpretation of what was meant by holding one's self out as an attorney. In that particular case the person involved told individuals that he was authorized to represent them in court; did inform them that he was admitted to practice and did represent individuals for hire. Of course, it was held that he "held himself out."

In the case of *State v. Snow*, 9 Pac. 697, it was held that when a man, by language and conduct, leads the world to believe that he and a woman were living and associating themselves together as husband and wife, that he was "holding himself out" as the husband because by his acts he led others to rely on and to believe that he was the husband.

In the case of *Commonwealth v. Doss*, a Virginia case, 167 S.E. 371, it was held that holding one's self out connotes a certain continuity of purpose.

In a Washington case, *State v. Kelsey*, 283 Pac. 2d 982, it was stated that a person holds himself out as a physician when he leads others to believe that he can lawfully engage in such practice.

It has been held, *People v. Wolin*, 2 Pac. 2d 60 (Cal.), that "holds out for sale" means "offers for sale."

In *Vincent v. The United States*, 58 Atl. 2d 829, the question is answered as to what is meant by the term "holds itself out," as that term is applied to a common carrier. The court there held that the words clearly imply that the carrier in some way makes known to its prospective patrons that its services are available. The court pointed out that

Honorable Proctor Carter

this might be made known in various ways but, however it is made known, the essential thing is that there shall be a public offering of the service or, in other words, a communication of the fact that service is available to those who may wish to use it.

It is quite clear from the various court interpretations of the words "holds itself out" that the Home in question in no way whatsoever meets the standards the courts have used in interpreting that phrase. The Home definitely does not hold itself out to the public; it does not hold itself out even to the members of the Masonic fraternity; it does not hold itself out as a business; it does not hold itself out as being in an occupation.

From a reading of Chapter 210 of our statutes it is quite clear that the legislature intended to direct the requirements and standards therein set forth toward those who are in the business or follow the occupation, so to speak, of conducting a "boarding home for children," or "day care homes," or "day nurseries," or "child placing agencies."

CONCLUSION

From the foregoing facts and law it is our opinion that the Masonic Home of Missouri does not come within the provisions of Chapter 210, Cumulative Supplement 1955, and that there is no duty or responsibility of the State Division of Welfare to license or inspect that portion of the Masonic Home of Missouri devoted to the care of children.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours,

John M. Dalton
Attorney General

RSN:lc

AID TO DEPENDENT
CHILDREN:
HOUSE BILL NO. 69:

It is the duty of the Division of Welfare to pay Aid to Dependent Children benefits to children 16 and 17 years of age, who otherwise qualify for such benefit on and after August 29, 1957.



July 17, 1957

Honorable Proctor N. Carter
Director
Division of Welfare
Jefferson City, Missouri

Dear Mr. Carter:

Your recent request for an official opinion reads:

"House Bill 69, as enacted by the 69th General Assembly and approved by the Governor, repeals and re-enacts Section 208.040, MRS Cum. Supp. 1955. Provision is made in this law for Aid to Dependent Children benefits to be paid on behalf of a dependent child who is under the age of 18 years, under certain conditions. The maximum age in the repealed statute was under 16 years.

"Appropriations made by the 69th General Assembly for paying Aid to Dependent Children benefits was \$5,745,000. (House Bill 243, Section 6.170). This appropriation was based on the estimated number of Aid to Dependent Children recipients under 16 years and did not take into account the paying of benefits to children 16 and 17 years of age. Due to the fact House Bill 69 was passed on May 30, a supplemental appropriation to cover benefit payments to this new group was not made.

"In view of the above and foregoing, I would appreciate receiving an opinion from you as to whether or not it is the duty of the Division of Welfare to pay Aid to Dependent Children benefits to children 16 and 17 years of age, who otherwise qualify for such benefits, when House Bill 69 becomes effective."

You correctly state that House Bill No. 69 of the 69th General Assembly repeals Section 208.040, Missouri Revised Statutes Cumulative Supplement 1955, which fixed the age at

Honorable Proctor N. Carter

which benefits were to be paid to dependent children, who met certain qualifications, at under 16 years, and that it re-enacts Section 208.040 and fixes that age at under the age of 18 years, subject to certain conditions set forth in the Bill. That is to say that the bill simply changes the age of eligibility from under the age of 16 to under the age of 18. This Bill becomes effective on August 29, 1957.

You also correctly stated that the appropriation for Aid to Dependent Children (House Bill 243, 69th general assembly, page 16, line 9) is \$5,745,000.00.

Your question is whether it is the duty of the Division of Welfare to pay Aid to Dependent Children benefits to children 16 and 17 years of age, who otherwise qualify for such benefits, when House Bill No. 69 becomes effective.

It would appear to us that the answer to this is in the affirmative. House Bill No. 69 unqualifiedly and unreservedly includes children of this age group as being eligible for these benefits. The appropriation bill, of course, simply appropriates a gross sum of money for Aid to Dependent Children. It would seem to us that there could be no question but what the new age group is to receive the benefits.

CONCLUSION

It is the opinion of this department that it is the duty of the Division of Welfare to pay Aid to Dependent Children benefits to children 16 and 17 years of age, who otherwise qualify for such benefits, on and after August 29, 1957.

The foregoing opinion, which is hereby approved, was prepared by Assistant Attorney General Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

By

Robert R. Welborn
Assistant Attorney General

HPW/bi

INMATES OF THE PENITENTIARY: Labor of inmates of the Missouri State
STATE PARKS: Penitentiary may be used in improving
LABOR OF INMATES: the parks belonging to this state.

FILED

15

October 15, 1957

Honorable James D. Carter
Director
Department of Corrections
Jefferson City, Missouri

Dear Colonel Carter:

This will acknowledge receipt of your opinion request of September 12, 1957, which reads as follows:

"The Department of Corrections is very desirous for an opinion on whether or not inmates of the Missouri State Penitentiary can be used in conjunction with State Park work.

"The nature of this work would be clearing underbrush, building fences and any other labor required to beautify our State parks. We are contemplating a camp setup to house inmates and they will be used in improving and beautifying State owned property only.

"Section 22 of House Bill 377 grants this permission to the Department; also, the Revised Statutes of 1955, Section 216.335 permits the Department to employ inmates for this type project.

"It is respectfully requested that a legal opinion be sent to this office so that we may lay the groundwork and proceed with our project."

The question arises in view of the provisions contained in Section 216.335, RSMo Cum. Supp. 1955. Section 22, House Bill No. 377, 68th General Assembly, is the same as the statute (Section 216.335, supra) referred to, and reads as follows:

Honorable James D. Carter

"The division may use the labor of inmates not otherwise employed on improving any of the public grounds belonging to the State, in securing supplies for the institution, for the protection of state property from changes, or washes in the Missouri River, or for any other reasonable purposes that the division deems advisable."

In paraphrasing the quoted section, it is clear that the labor of inmates may be used in improving any of the public grounds belonging to the State. Since the question here is whether or not the labor of inmates may be used with respect to State parks, the question arises as to whether or not State parks are included within the term "public grounds belonging to the state." No cases from this State have been found where a question has arisen in connection with parks under a statute providing for certain duties and/or liabilities in connection with public grounds belonging to the State or a municipality. In other words, no cases from this State have been found where the term "public grounds" has been interpreted in connection with State parks. However, there are several cases on this subject decided in other jurisdictions. In all of the cases found, the courts have construed the term "public grounds" to include parks. In one case, *City of Cleveland v. Ferrando*, 150 N.E. 747, 114 O.St. 207, there was a statute imposing a duty upon municipalities to keep the public grounds free from nuisance. The question arose in that case as to whether or not a park owned and controlled by the city came within the meaning of the term "public grounds" as used in the statute there involved. The court held that it did. For the same result, see *Gaines v. Village of Wyoming*, 72 N.E.2d 369, 147 O.St. 491; *Gottesman v. City of Cleveland*, 52 N.E.2d 644, 142 O. St. 410; *King v. Sheppard*, Tex. Civ. App., 157 S.W.2d 682; *Lloyd v. City of Great Falls*, 86 P.2d 395, 107 Mont. 442. As aforementioned, in none of the cases where the term "public grounds" has been construed has there been an exclusion of parks from the meaning of said term.

The only remaining question is whether or not the statute is to be interpreted literally. We believe in this case that it is to be so construed. In the case of *State v. Sestric*, 216 S.W. 2d 152, 1.c. 154 the court stated that:

"* * *Where statutes are plain, unambiguous and simple, there is no room for 'construction' and they must be applied by the courts as they are written by the legislature. * * *"

Honorable James D. Carter

Also in this connection, see the case of State ex rel. Cobb v. Thompson, 5 S.W.2d 57, in which the court stated the rule to be as follows, l.c. 59:

"'A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.'"
(Citations omitted)

In view of the above quoted rule, we believe that the section in question is not open for construction and that the same is to be interpreted literally, as written.

In view of the foregoing, it is concluded that the term "public grounds belonging to this state" includes within its meaning State parks and that labor of inmates may be used in improving the same.

CONCLUSION

It is, therefore, the conclusion of this office that labor of the inmates of the Missouri State Penitentiary may be used in improving the parks belonging to this State.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Henry.

Very truly yours,

John M. Dalton
Attorney General

HLH:hw

UNITS:
ELECTION:
COSTS:

held on the same day as township elections; notice of the health unit election would be necessary as set forth in the statute, Section 205.010, RSMo Cum. Supp. 1955; county would bear the expense of the election; county and townships in the county would not share this election expense.



February 7, 1957

Honorable Don Chapman, Jr.
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"A county wide election to vote on a County Health Unit, under 205.010 Missouri Revised Statutes, is contemplated in March here in Livingston County.

"The County Court wishes to have this election on the same day that all township elections in Livingston County are scheduled. This raises these questions:

"(a) Would the Health Unit Election be valid if held on the same day with the township elections?

"(b) Would notice of the Health Unit Election be necessary as stated under the statute?

"(c) Who would have to bear the expense of this election?

"(d) Could the county and the townships share this election expense?

"Please send me your opinion on these matters."

In reference to your first and second (a), (be) questions, we direct attention to Section 205.010, RSMo Cumulative Supplement 1955, which reads:

Honorable Don Chapman, Jr.

"Any county, subject to the provisions of the constitution of the state of Missouri, may establish, maintain, manage and operate a public health center in the following manner: Whenever the county court shall be presented with a petition signed by at least ten per cent or more of the qualified voters of the county, as determined by the number of votes cast for governor at the preceding general election, asking that an annual tax not in excess of ten cents on each one hundred dollars of the assessed valuation of property in the county, be levied for the establishment, maintenance, management and operation of a county health center and the maintenance of the personnel required for operation of the health center, the county court shall submit the question to the qualified voters of the county at the next general election to be held in the county or at a special election called for the purpose, the county clerk giving notice, published once each week for two consecutive weeks prior to such election date, in one or more newspapers published in the county, if any such be published, and if not so published, by posting written or printed notices in each township of the county, fourteen days prior to the election date, which notices shall include the text of the petition and state the rate of tax to be levied annually thereafter upon the assessed property of the county."

It will be noted that this section states that "the county court shall submit the question (of whether there shall be a county health center) to the qualified voters of the county at the next general election to be held in the county or at a special election called for the pur-

Honorable Don Chapman, Jr.

pose . . . " In view of the above, it is made perfectly clear that the vote upon a county health center may be held at the same time as another election, to wit, a general election. It therefore follows that the county court could call for a special election upon the county health center, which election should be held at the same time as the township elections, the point being that it is not repugnant to the law for the special health center election to be held at the same time as another election. This being true, it follows that the answer to your first (a) question is in the affirmative.

The statute (205.010, supra,) provides the manner in which notice shall be given of the county health center election. We do not believe that the fact that it is held upon the day of another election would have any effect upon the notice provided in the above section, and it therefore follows that the answer to your second (b) question is likewise in the affirmative.

In regard to your third (c) and fourth (d) questions, we direct your attention to an opinion, a copy of which is enclosed, rendered by this department on April 25, 1953, to Harry C. Watkins, Clerk of the County Court of Scott County, Missouri. You will note that this opinion holds that the county is liable for the expenses of holding an election at which county health center trustees are elected. Since this is a county election and not a township election we believe that the same plan would apply, and that the county is liable for the expense of holding the election which is provided for under Section 205.010, supra. The answer to your third (c) question, therefore, is the county in which the election is held.

Since there is no statute authorizing the townships to share the election expense with the county in elections to vote on the establishment of a public health center, we are of the opinion that the answer to your question (d) is in the negative.

Honorable Don Chapman, Jr.

CONCLUSION

It is the opinion of this department that a county health unit election would be valid if held on the same day as township elections; that notice of the health unit election would be necessary as set forth in the statute, Section 205.010, RSMo Cumulative Supplement 1955; that the county would bear the expenses of the election; that the county and the townships in the county would not share this election expense.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

1 enclosure

SALES TAX: A record of all sales tax returns made to the de-
RECORDS: partment of revenue must be kept; no authority ex-
ists for destroying these records at any time. Such
records may be preserved by microfilming or photo-
graphing, and when such records are reproduced in
this manner the original record may be destroyed.



February 27, 1957

Mr. L. M. Chiswell, Supervisor
Sales Tax Division, Department of Revenue
Jefferson State Office Building
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads
as follows:

"It is respectfully requested that
this department be provided with
an official opinion from your of-
fice with relation to the follow-
ing questions:

"First. For what period is the Sales
Tax Division of the Department of
Revenue required by Statute to pre-
serve and keep on file the sales tax
returns submitted to the department
by taxpayers.

"Second. Is the department authorized
by Statute to microfilm the sales tax
returns and subsequently destroy the
originals prior to the close of the
period during which the department is
required to preserve and keep such
returns.

"It has been the policy of the depart-
ment in the past to retain in our files
all returns submitted for the past four
previous years, plus returns submitted
for the current year, making five years
in all."

Mr. L. M. Chiswell

Chapter 144, RSMo 1949, is the law of Missouri relating to sales tax. Section 144.310 of that chapter reads:

"The director of revenue shall keep a record of every tax, interest and penalty imposed or paid under this chapter. (11434 A.L. 1941, p. 698, A.L. 1943 p.1012, A.L. 1945 p.1865)."

We are unable to find anywhere in the sales tax law any authorization for the destruction, at any time, of sales tax returns. The above is a particular statute relating to a specific phase of state government activity and would take precedence over any general law relating to public records. We do believe that such sales tax returns may be preserved in the manner set forth in Section 109.120, RSMo 1949, which reads:

"The head of any business, industry, profession, occupation or calling, or the head of any state, county or municipal department, commission, bureau or board may cause any or all records kept by such official, department, commission, bureau, board or business to be photographed, microphotographed, photostated or reproduced on film. Such film or reproducing material shall be of durable material and the device used to reproduce such records on such film or material shall be such as to accurately reproduce and perpetuate the original records in all details. (L.1945 p.1427, §§ 1,3, A.1949 H.B. 2048)."

Also, Section 109.130, RSMo 1949, reads:

"Such photostatic copy, photograph, microphotograph and photographic film of the original records shall be deemed to be an original record

Mr. L. M. Chiswell

for all purposes, and shall be admissible in evidence in all courts or administrative agencies. A facsimile, exemplification or certified copy thereof, shall, for all purposes recited in section 109.120 to 109.140, be deemed to be a transcript, exemplification or certified copy of the original. (L.1945 p.1427 § 2)."

Also, Section 109.140, RSMo 1949, reads:

"Whenever such photostatic copies, photographs, microphotographs or reproductions on film shall be placed in conveniently accessible files and provisions made for preserving, examining and using same, the said head of a state department, commission, bureau or board, county office or department, city office or department may certify those facts to the governor, or to the county court or to the mayor of a municipality, respectively, according to their status as subdivisions of government, who shall have the power to authorize the disposal, archival storage or destruction of the records or papers from which such photographic copies were made. (L.1945 p.1427 § 4, A. 1949 H.B. 2048)."

On May 25, 1956, this department rendered an opinion to James L. Paul, Prosecuting Attorney of McDonald County, a copy of which opinion is enclosed. We send you this opinion because it states the general rule regarding the destruction of public records.

CONCLUSION

It is the opinion of this department that a record

Mr. L. M. Chiswell

must be kept of all sales tax returns made to the department of revenue of the State of Missouri, and that no authority exists for destroying these records at any time. It is the further opinion of this department that such records may be preserved by microfilming or photographing, and that when such records are reproduced in this manner that the original record may be destroyed.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

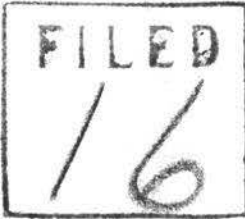
John M. Dalton
Attorney General

HPW:lc

1 enclosure

TAXES:
TAXATION:
TRUST ESTATES:
WILLS:
COLLECTOR OF TAXES:
EXEMPTION FROM TAXES:
EXECUTOR AND ADMINISTRATOR:

Executor has duty of paying taxes assessed and levied against property for 1956, wherein testatrix dies before said taxes are paid, and wherein she leaves her property for charitable purposes. Collector may collect taxes if executor does not pay them.



March 27, 1957

Honorable Don Chapman, Jr.
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Chapman:

This is in answer to your request for an official opinion from this office which reads as follows:

"A question has arisen here as to whether or not City and School taxes assessed for the year 1956 on the real and personal property of Minnie B. Hedrick, deceased, is collectible.

"Minnie B. Hedrick died on November 6, 1956, a resident of Chillicothe, Livingston County, Missouri.

"Pursuant to the provisions of her last will and testament, which has been admitted to probate in the Probate Court of Livingston County, Missouri, all of the property, real and personal, in said estate, with the exception of a bequest to a church and two specific bequests made therein, is devised and bequeathed to the First National Bank of Kansas City, in trust, for the use and benefit of the Chillicothe Hospital and charitable and indigent patients who are residents of Chillicothe and Livingston County.

"The Chillicothe Hospital is owned and operated by the City of Chillicothe, Missouri, and it appears that under the provisions of the will of Mrs. Hedrick, the property of the trust is to assist financially the Chillicothe Hospital, and thus the City of Chillicothe is the equitable beneficiary of the trust.

* * * * *

Honorable Don Chapman, Jr.

"I wish you would give your official opinion as to whether or not the taxes assessed by the City of Chillicothe for the year 1956 on the real property, situate in the City of Chillicothe, the legal title of which is now in the First National Bank, as trustee, and the personal property, the title to which is now in the executor of the estate and which will eventually be transferred to the trustee or the proceeds thereof be paid to the trustee, can now be legally collected from the trustee or the executor of the estate of Minnie B. Hedrick."

On January 1, 1956, Mrs. Minnie B. Hedrick was the owner of real and personal property located within Chillicothe, Livingston County, Missouri, and Livingston County without Chillicothe. Section 137.075, RSMo 1949, provides that every person owning or holding such property on the first day of January, including all such property purchased on that day, shall be liable for the taxes thereon during the same calendar year. Thus, the first day of January is the crucial date. Section 137.085, RSMo 1949, provides, among other things, that there shall be a lien on the land for taxes assessed and levied in favor of the state, and provides for the enforcement of that tax lien on the land. The other method, in which taxes against realty may be collected in Missouri, is by distraint of the personalty of the taxpayer owing the tax on the realty. This is authorized by Section 139.120, RSMo 1949. Section 140.730, RSMo 1949, provides, among other things, that taxes assessed and levied on personal property shall constitute a debt for which a personal judgment may be recovered against the taxpayer for failure to pay the taxes. See *In re Life Ass'n. of America*, 12 Mo. App. 40, 49, wherein the Court said:

"* * * The right thus given to distraint personal property for 'all taxes,' as well before as after they have become delinquent, shows that all taxes are personal charges against the owner of the property in respect of which they are levied. * * *"

(Emphasis ours.)

From your letter, it appears that on November 6, 1956, the date of Mrs. Hedrick's death, taxes had been assessed and levied against the real and personal property of Mrs. Hedrick, but that they had not been paid. From the foregoing, the result is that on November 6, 1956, Mrs. Hedrick was personally liable for these taxes. However, on that date, she died testate. The problem now becomes one of whether or not these taxes can be collected.

Honorable Don Chapman, Jr.

Mrs. Hedrick's will directed that all her just debts be paid; it left \$1,000.00 to a church; it left 600 shares of stock (a specific bequest) in trust for two named beneficiaries; and finally, it gave all the rest, residue and remainder of her estate, real, personal and mixed, to a trustee, "to be held, administered and distributed as a charitable trust upon the following terms and conditions." It provided the trustees should administer the trust estate and pay over the income to "The Hedrick Foundation" when needed and requested by said foundation for any one or more of the following purposes: (1) to pay the hospital expenses of those indigent persons within the county who received aid from the Chillicothe City Hospital, which is owned by said city; (2) to pay the expenses of operating and maintaining said Foundation; and (3) if the City so desired, to pay for a new hospital or an addition to the hospital or a new nurses' home. The will provided for remainders over if the City of Chillicothe ever ceased to own the hospital.

Thus, when Mrs. Hedrick died testate, the title to her real and personal property passed to the persons to whom it was devised by her last will, but it was subject to the possession of the executor and was chargeable with the payment of the claims against the estate. This is Section 84 of the Model Probate Code adopted in Missouri on January 1, 1956, and is now Section 473.260, RSMo, Cum. Supp. 1955. One of the duties of an executor is to pay all outstanding claims against an estate, and Section 473.397, RSMo, Cum. Supp. 1955, provides that taxes due the state, county, incorporated city, or town is a claim against the estate of a decedent. That section further provides, among other things, that the executor shall pay all taxes without any claim therefor being presented to the court for allowance. Thus, we hold the executor of Mrs. Hedrick's will has the duty to pay the taxes assessed and levied against her property, both real and personal, for 1956. (This opinion does not decide about the taxes for 1957.) If the executor does not pay them, then the collector has the power to proceed against the property as authorized in Sections 137.085, 139.120 and 140.730, mentioned previously in this opinion, or other sections provided by law.

In your letter, you state that it appears as if the hospital owned by the city of Chillicothe is the equitable beneficiary of the testamentary trust of the residue, and that the taxes mentioned above cannot now be collected because the city would be tax exempt. Article X, Section 6 of the 1945 Constitution of Missouri provides as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit, and used exclusively for

Honorable Don Chapman, Jr.

religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Section 137.100, RSMo 1949, provides as follows:

"The following subjects shall be exempt from taxation for state, county or local purposes:

* * * * *

(6) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational or charitable purposes."

These provisions, as construed by the Missouri Supreme Court, en banc, in the case of St. Louis Council of Boy Scouts of America v. Burgess, 240 S.W. 2d 684, require that there must be a showing of a present, actual, regular, and exclusive user of all the property owned by the charity for purposes purely charitable before the property is exempt from taxation, and that mere prospective user for purposes purely charitable is not sufficient to exempt the property from taxation. In our case, the property in the testamentary trust was not being used for charitable purposes on January 1, 1956, which is the crucial date. That this is so was pointed out in an opinion written by this office on November 20, 1956, to the Honorable Roy W. McGhee, Jr., a copy of which is herein enclosed. Furthermore, in the light of Ramsey v. City of Brookfield, 237 S.W. 2d 143, 361 Mo. 857, wherein property was left in trust to the City of Brookfield so the city could build a hospital, query whether the City of Chillicothe is the equitable beneficiary of this testamentary trust.

However, in reaching our conclusion in this opinion, we do not decide who the beneficiary of the testamentary trust is. It is not necessary to decide that point. We hold that since the estate is not closed, the testamentary trustee of Mrs. Hedrick's

Honorable Don Chapman, Jr.

will, who at the present time has only bare legal title, does not now have that legal title which is sufficient to raise an equitable title in anyone. It is possible the claims against the estate may exhaust it. If so, no one would be an equitable beneficiary of this trust. At the most, some beneficiary, at the present time has an expectancy of acquiring a benefit. Also, until the estate is closed, the testamentary trustee does not have the authority to touch or administer the property as it is provided in the will. As stated previously, possession is in the executor. This result above is based upon new law, Section 183 of the Model Probate Code, which is now Section 473.617, RSMo, Cum. Supp. 1955, paragraph 4, which reads as follows:

"4. The decree of final distribution is a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interests therein, subject only to the right of appeal and the right to reopen the decree. It operates as the final adjudication of the transfer of the right, title and interest of the decedent to the distributees therein designated; but no transfer before or after the decedent's death by an heir or devisee shall affect the decree, nor shall the decree affect any rights so acquired by grantees from the heirs or devisees."

From reading this paragraph, it is apparent that the testamentary trustee does not now have that full ripened legal title as is contemplated in the will, and will not have it until after there is a decree of final distribution from the court.

CONCLUSION

It is, therefore, the opinion of this office that the executor of Mrs. Hedrick's will has the duty to pay the taxes assessed and levied against her property, both real and personal, for 1956. If the executor does not pay these taxes, then the collector has the power to proceed against the property in the hands of the executor as provided in Sections 137.085, 139.120 and 140.730, RSMo 1949, or other sections provided by law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, George E. Schaaf.

Yours very truly,

JOHN M. DALTON
Attorney General

GES/b1

Enc.

SCHOOLS:
SCHOOL DISTRICTS:
TAXES:

Where common school district is divided by reorganization plan after levy and assessment of taxes, tax moneys collected for current year should be paid to such common school district. Upon division of district by reorganization plan, county board of education has reasonable time after expiration of sixty days within which to annex remaining portion of divided district to adjoining district.



May 2, 1957

Honorable Don Chapman, Jr.
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Chapman:

This is in response to your request dated January 30, 1957, which reads as follows:

"Recently in Livingston County there has been quite a movement to consolidate the school districts under the Chapter 165 Missouri Revised Statutes. In December, 1957, Chillicothe Reorganized District RII was formed in a special election.

"The new reorganized district, RII, is composed of many common school districts. In the South part of the county the boundary of the said RII passes through the Condron and Blue Mound common school districts, leaving a portion of the common school district without a place to go. This was done because the constituents in the South part of the school districts, Blue Mound and Condron, did not wish to become a part of Chillicothe RII. They want to be annexed to the Tina-Avalon School in Carroll County.

"Under 165.685 Missouri Revised Statutes, if the remaining part of any divided district fails to become a part of a

Honorable Don Chapman, Jr.

reorganized district within sixty days and does not meet the requirements of Section 165.177, the part shall be annexed by the county board to an adjoining district. The Livingston School Board plans to comply with the desire of the people in the Condron and Blue Mound districts by sending them to the Tina-Avalon School. The sixty days under the said statute will lapse in a short time. Another added factor is that the Blue Mound district is operating an elementary school and have their budget all set up for this school year. If the South part of the Blue Mound District was annexed to Tina-Avalon, where would the tax money go from this portion annexed? Would the Blue Mound District, in reality Chillicothe RII, realize the tax proceeds or would the Tina-Avalon School get it?

"Another question arises as to the construction of 165.685 Missouri Revised Statutes which I have quoted in part, in this letter. Does the County Board of Education have to assign the remaining part of a common school district immediately after sixty days, or can this assignment be held in abeyance, say until the school year is complete? This would seem to alleviate the trouble I described in the previous paragraph."

As we understand your opinion request, the basic problem involved is the disposition of the taxes levied and assessed by the Blue Mound and Condron districts prior to the formation of Chillicothe Reorganized District R-II but not collected until after the formation of such reorganized district and the consequent division of the Blue Mound and Condron districts. We gather from your request that the remaining portions of the Blue Mound and Condron districts do not meet the requirements of Section 165.177, RSMo 1949, so that the provisions of Section 165.685, RSMo, Cum. Supp. 1955, are applicable to such districts. This does not mean, however, that such districts cease to exist

Honorable Don Chapman, Jr.

until and unless they either vote to become a part of an adjoining district or after the lapse of sixty days are annexed by the county board to an adjoining district. Until one of these events occurs, the Blue Mound and Condron districts continue to exist.

In *Rice v. McClelland*, 58 Mo. 116, a school district was divided after taxes were levied and assessed but before they were collected and distributed. Contention was made that it would be inequitable to permit the original district to retain the taxes levied, assessed and collected on that portion which had been detached therefrom and formed into a new district. The court held, however, that the township board had no authority to apportion this tax money between the two districts as it had purported to do and affirmed the decision of the circuit court ordering the township collector to pay out and disburse this tax money on order of the board of directors of the original district.

We are of the opinion that the same principle would be applicable here and that the county treasurer should pay out and disburse the money collected from taxes levied and assessed by the Blue Mound and Condron districts upon order of the respective boards of directors of those districts, or their successors, if in the meanwhile those districts have become annexed to an adjoining district.

This tax money then becomes part of the funds of the Blue Mound and Condron districts which are to be taken into account in the adjustment and apportionment contemplated by Sections 165.014 and 165.015, RSMo, Cum. Supp. 1955. For your assistance in that regard, we are enclosing herewith copy of an opinion of this office rendered to Honorable Hubert Wheeler under date of March 28, 1957.

With regard to your second question, since no time limit is specified in Section 165.685, RSMo, Cum. Supp. 1955, within which after the expiration of sixty days the county board of education shall annex the remaining territory of a divided district to an adjoining district, we can only presume that the Legislature intended for this annexation to be done within a reasonable time, which might vary with the facts and circumstances of each individual case.

Honorable Don Chapman, Jr.

CONCLUSION

It is the opinion of this office that the moneys collected from taxes levied and assessed in the Blue Mound and Condron school districts of Livingston County for the year 1956 should be paid out and disbursed upon order of the respective boards of directors of those districts, or their successors, if in the meanwhile those districts have been annexed to an adjoining district.

It is the further opinion of this office that the county board of education has a reasonable time after the expiration of sixty days within which to annex the remaining portions of the Blue Mound and Condron districts to an adjoining district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

John M. Dalton
Attorney General

JWI:ml,lw

Enc.

January 22, 1957

FILED

18

Honorable William A. Collet
Prosecuting Attorney Jackson County
415 East Twelfth Street
Kansas City, Missouri

Dear Mr. Collet:

We are in receipt of your letter of the eleventh of this month, in which you ask this office for an opinion answering three specific questions pertaining to the issuance of identification cards to non-paid persons designated as "special" investigators for your office.

We shall endeavor to answer your questions to the best of our ability but do so in this letter instead of in the nature of an official published opinion. Your questions do not seem to be about problems prevalent in other parts of the state.

Your questions are as follows:

- No. 1. "Under the provisions of Sections 56.150 to 56.160, as well as other provisions relating to Prosecuting Attorneys in general, is there any statutory authority for the appointment of 'special' investigators, or other employees who receive no compensation from the County?"

We are definitely of the opinion that there is no such authority. Such office as special investigator would definitely be a public office. Section 56.150 authorizes you to appoint assistants, stenographers, clerks and investigators when approved by the judges of the circuit court. Notice that there are no other officers authorized under that section. The number of investigators, as well as the number of other help mentioned, shall be such as is determined by the judges "to be

Honorable William A. Collet

necessary." The section also states that the investigators shall be paid in the same manner and from the same funds as the prosecuting attorney. Section 56.160, Cumulative Supplement 1955, provides for the investigators to be paid \$3600.00 per year.

In the case of State v. Truman, 64 S.W. 2d 105, 106, it is said that numerous criteria have been resorted to in determining whether a person is an officer. It was said that it is the duty of the office and the nature of the duty that makes one an officer, and not the extent of the authority. The court in that case quoted from Mechem on Public Officers, as follows:

" 'A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.' "

In the case of State v. Meriwether, 200 S.W. 2d 340, the court said, 1.c. 341:

"It is not possible to define the words 'public office or public officer.' The cases are determined from the particular facts, including a consideration of the intention and subject-matter of the enactment of the statute or the adoption of the constitutional provision. State ex inf. McKittrick, Attorney General v. Bode, 342 Mo. 162, 113 S.W. 2d 805, loc.cit.806."

Notice in the case of State v. Smiley, 263 S.W. 825, 826, it is held that "It is well settled that only the

Honorable William A. Collet

Legislature has the power to create a public office (other than a constitutional office) as an instrumentality of government, and this power it cannot delegate."

From the foregoing, we conclude that the office of special investigator, regardless of the duties which you might assign such a designated individual, would be a public officer and, further, that since the Legislature has not authorized you to create such you have no power or authority to do so.

Your question No. 2 is:

"If there is no statutory authority for such appointment, is the displaying of identification cards, badges and other indicia of appointment to such office illegal and in violation of the criminal laws of the State of Missouri?"

Without more facts we can't say definitely what statute might be violated by the displaying of the identification cards or badges. From the facts as you have given them, that some of these holders "obtain certain honorariums given to members of the Police Department and other law enforcement agencies, such as free admission to athletic contests, special discounts in stores, as well as for other purposes," there seems to us to be a strong possibility that there would be a violation of Section 562.180, to wit, the impersonating of a peace officer.

Your third question is:

"If there is no statutory authority for such appointments, would the holders of such identification cards and badges obtained pursuant thereto, be exempt from the provisions of Section 564.610, prohibiting the carrying of concealed weapons?"

The answer to this we think is, of course, No. Section 564.610 exempts only the "legally qualified" sheriffs,

Honorable William A. Collet

police officers and "other persons" whose bona fide duties require them to execute process, either civil or criminal, make arrests, or aid in conserving the public peace. Such persons as you indicate certainly could not be some of the "other persons" who were "legally qualified" and certainly their duties seem to be nil.

These answers, which I approve, were written by my assistant, Russell S. Noblet.

Very truly yours,

John M. Dalton
Attorney General

RSN:lc

MENTAL HEALTH:
INSANE PERSONS:

Recovery of competency inquiry provided for in Sec. 475.360 RSMo Cum. Supp. 1955 need not be employed to qualify person to serve as administrator of an estate subsequent to such person's discharge as a "mentally ill individual" under authority of Sec. 202.827 RSMo Cum. Supp. 1955.



January 23, 1957

Honorable James A. Cole
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Mr. Cole:

This opinion is rendered in reply to your inquiry reading as follows:

"The Hon. Edwin Hoemann, Probate Judge of Franklin County, Missouri has requested that I write you concerning the mentally ill laws.

"A resident of Franklin County, under RSMo. Section 202.807, was found to be mentally ill, and was ordered to be hospitalized for an indeterminate period. Said resident has now been released by the State Hospital.

"Prior to the above proceeding, the spouse of the resident died.

"The question involved is whether it shall be necessary to have a proceeding under RSMo. Section 475.360 'Recovery of competency, inquiry', before the resident could serve as Administratrix or in behalf of herself file for her rights as surviving spouse."

The general rule on qualifications of a natural person to serve as an executor or administrator is found in the following language from Section 473.117 RSMo Cum. Supp. 1955:

"1. No judge or clerk of any probate court, in his own county, or his deputy, no person under twenty-one years of age, or of unsound mind, no habitual drunkard,

Honorable James A. Cole

and, except as otherwise provided by law, no person who is a nonresident of this state, shall be executor or administrator. No executor of an executor, in consequence thereof, shall be executor of the first testator." (Emphasis supplied)

Section 202.807 RSMo Cum. Supp. 1955 outlines procedure for involuntary hospitalization, on court order, of a person alleged to be "mentally ill" as such term is defined in the following language from Section 202.780(5) RSMo Cum. Supp. 1955:

"'Mentally ill individual,' an individual having a psychiatric or other disease which substantially impairs his mental health who may or may not be legally insane."

The informal nature of hearings under procedure outlined in Section 202.807 RSMo Cum. Supp. 1955, is evident from the following language from such statute:

"* * * The hearings shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the proposed patient. The court shall receive all relevant and material evidence which may be offered and shall not be bound by the rules of evidence.
* * *"

The scope of an order of the probate court in a proceeding under Section 202.807, supra, is outlined in the following language from subparagraphs 7 and 8 of such statute:

"7. If, upon completion of the hearing and consideration of the record, the court finds that the proposed patient is mentally ill, and is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient insight or capacity to make

Honorable James A. Cole

responsible decisions with respect to his hospitalization, it shall order his hospitalization for an indeterminate period or for a temporary observational period not exceeding six months; otherwise it shall dismiss the proceedings. If the order is for a temporary period the court at any time prior to the expiration of such period, on the basis of report by the head of the hospital and such further inquiry as it may deem appropriate, may order indeterminate hospitalization of the patient or dismissal of the proceedings.

"8. The order of hospitalization shall state whether the individual shall be detained for an indeterminate or for a temporary period and if for a temporary period, then for how long."

A review of the language quoted from Section 202.807, supra, touching the power of the probate court to make findings, discloses an absence of any authority in the court to find the person legally insane. This special procedure looks to corrective treatment of persons mentally ill, rather than to a judicial determination of sanity or insanity. The authority vested in the head of a hospital to discharge a person hospitalized under procedure outlined in Section 202.807 RSMo, supra, is found in Section 202.827 RSMo Cum. Supp. 1955, reading as follows:

"The head of a hospital as frequently as practicable shall examine or cause to be examined every patient and whenever he determines that the conditions justifying involuntary hospitalization no longer obtain, discharge the patient."

The extent to which the legislature has guaranteed civil rights of persons hospitalized for treatment under procedure outlined in Section 202.807, supra, is additional proof that corrective treatment, rather than hospitalization of persons judicially declared incompetent, by reason of insanity, is the goal to be achieved. Section 202.847 RSMo Cum. Supp. 1955, provides:

Honorable James A. Cole

"1. Subject to the general rules and regulations of the hospital and except to the extent that the head of the hospital determines that it is necessary for the medical welfare of the patient to impose restrictions, every patient shall be entitled:

(1) To communicate by sealed mail or otherwise with persons, including official agencies, inside or outside the hospital;

(2) To receive visitors; and

(3) To exercise all civil rights, including the right to dispose of property, execute instruments, make purchases, enter contractual relationships, and vote, unless he has been adjudicated incompetent and has not been restored to legal capacity.

"2. Notwithstanding any limitations authorized under this section on the right of communication, every patient shall be entitled to communicate by sealed mail with the division and with the court, if any, which ordered his hospitalization.

"3. Any limitations imposed by the head of the hospital on the exercises of these rights by the patient and the reasons for such limitations shall be made a part of the clinical record of the patient."

Section 475.360 RSMo Cum. Supp. 1955, referred to in the opinion request, is a part of Missouri's new Probate Code particularly applicable to guardianships of minors and incompetents, and reads as follows:

"For and on behalf of any person previously adjudged to be incompetent or of unsound mind by any court in the state of Missouri, there may be filed in the probate court of the county wherein he was adjudged incompetent or of unsound mind, a petition in writing, verified by oath or affirmation, alleging that subsequent to such adjudication he has fully recovered his mental health and been

Honorable James A. Cole

restored to his right mind and is now capable of managing his affairs, and the probate court wherein the petition is filed shall hold an inquiry as to the mental condition of the person in whose behalf the petition is filed. If the court, upon the inquiry, finds that the person is not restored to his right mind, and such person, or anyone for him, within ten days after such finding, files with the court an allegation in writing, verified by oath or affirmation that the person is of sound mind and is aggrieved by the action and finding of the court, the court shall then cause the facts to be inquired into by a jury."

A reading of Section 475.360, supra, discloses that procedure outlined therein is to be employed only after a person has previously been adjudged to be "incompetent or of unsound mind" in any court in the state of Missouri. Procedure looking to the initial appointment of a guardian of a minor or incompetent is fully outlined in Chapter 475 RSMo Cum. Supp. 1955, and such law has superceded Chapter 458 RSMo 1949, entitled "guardians of insane persons and drunkards." It is reasonable to conclude that Section 475.360, supra, providing for a restoration of competency inquiry has reference to an adjudication of incompetency after application for guardianship has been initiated under Chapter 475 RSMo Cum. Supp. 1955.

In the forepart of this opinion we have quoted the definition of a "mentally ill individual" found in Section 202.780(5) RSMo Cum. Supp. 1955, and disclosed the authority of the head of a hospital to discharge such a "mentally ill individual" by citing Section 202.827 RSMo Cum. Supp. 1955. The definition of a "mentally ill individual" discloses that the person may or may not be legally insane. It is the opinion of this office that legal insanity or incompetency is to be adjudicated under procedures outlined in Chapter 475 RSMo Cum. Supp. 1955, or related statutes, other than under Section 202.807 RSMo Cum. Supp. 1955. Accordingly, it is concluded that Section 475.360 RSMo Cum. Supp. 1955, looking to an inquiry to establish recovery of competency need not be employed to qualify a person to serve as administrator of an estate subsequent to such person's discharge as a "mentally ill individual" under authority contained in Section 202.827 RSMo Cum. Supp. 1955.

Honorable James A. Cole

CONCLUSION

It is the opinion of this office that Section 475.360 RSMo Cum. Supp. 1955, looking to an inquiry to establish recovery of competency need not be employed to qualify a person to serve as administrator of an estate subsequent to such person's discharge as a "mentally ill individual" under authority contained in Section 202.827 RSMo Cum. Supp. 1955.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:hw

PROBATE: Probate judge in county having more than thirty
PROBATE JUDGE: thousand and less than seventy thousand in-
PROBATE COURT: habitants, and assessed valuation over thirty
million dollars, may not pay in excess of
three thousand dollars per annum for clerk hire.



March 22, 1957

Honorable David L. Colson
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Mr. Colson:

This is in response to your request for opinion dated
February 4, 1957, which reads as follows:

"I wish to make request for an official
opinion regarding the payment of a salary
to the Probate Clerk of this county.

"The Probate Judge of St. Francois County
has raised the salary of his clerk to the
amount of two-hundred and seventy-five
dollars (\$275.00) per month. According
to Section 483.475 R.S. Missouri, 1949,
the clerk of a third class county is en-
titled to three thousand dollars (\$3,000.00)
annually. Apparently the payment of the
present salary is in violation of this
section.

"If you would please favor me with an
early opinion on this matter, I would
certainly appreciate it."

Section 483.475, RSMo, Cum. Supp. 1955, reads as follows:

"1. In all counties now or hereafter having
more than thirty thousand inhabitants, the
probate judges shall appoint their own
clerks, assistants and stenographers, and
shall determine their number and their sal-
aries by order of record and may remove
them when in the discretion of such judges

Honorable David L. Colson

it is deemed advisable. All salaries of such judges and their appointees shall be paid monthly by the county, upon requisition issued by the judge of such court.

"2. In all counties now or hereafter having more than thirty thousand and less than seventy thousand inhabitants, the total salaries of all clerks, assistants and stenographers in the probate court for any one calendar year shall not:

(1) In counties with an assessed valuation of twenty million dollars or less, exceed the sum of one thousand two hundred dollars;

(2) In counties with an assessed valuation of more than twenty million dollars and not more than thirty million dollars exceed the sum of two thousand four hundred dollars;

(3) In counties with an assessed valuation of over thirty million, exceed the sum of three thousand dollars.

"3. In all counties of class two such salaries for such year shall not exceed the sum of six thousand six hundred dollars. In any county where need exists, the county court is authorized to provide such additional clerks, deputy clerks or other employees in the probate court as the county court in its discretion believes are required and is authorized to provide funds for payment of salaries or parts of salaries of such clerks, deputy clerks and employees in addition to the amounts hereinbefore specified.

"4. In any county now or hereafter having two hundred and fifty thousand or more inhabitants, the total salaries of all clerks, assistants and stenographers for any calendar year shall not be such that the total salaries of such judge and his appointees shall exceed the total sum of fees received and accounted for by such judge for such year."

Honorable David L. Colson

That section was construed in the light of its legislative history in an opinion of this office rendered to Scott O. Wright dated October 23, 1956, copy of which is enclosed. As in that opinion, with relation to Boone County, we take notice of the fact that St. Francois County has more than thirty thousand and less than seventy thousand inhabitants, with an assessed valuation in excess of thirty million dollars.

In the first subsection of Section 483.475, supra, the authority is granted to the probate judge in counties having more than thirty thousand inhabitants to appoint clerks, etc., and to fix the salaries. However, Subsection 2(3) thereof provides that the total salaries for clerks in counties having more than thirty thousand and less than seventy thousand inhabitants, with an assessed valuation of over thirty million dollars, shall not exceed three thousand dollars for any one calendar year.

If Section 483.475, supra, ended at this point, there could be no question but that the Legislature intended that there be an absolute limit of three thousand dollars per year for hiring of clerks, etc., in the office of probate judge.

However, as pointed out in the Wright opinion, referred to above, this section was first amended in 1947 so as to give the county court authority to hire additional clerks and other employees where probate courts may be held in more than one place in the county and to pay the salaries of such employees in addition to the amounts previously fixed therein. In 1951, it was again amended, removing therefrom the requirement that probate court be held in more than one place in the county before the county court could employ additional clerks, etc., and for counties of this class, raising the limit in Subsection 2(3) to three thousand per annum.

As the section now reads, the probate judge has the authority to hire as many clerks, assistants and stenographers as he sees fit and to pay such clerks, etc., a total of three thousand dollars in any one calendar year. However, regardless of whether he has one or more than one clerk, assistant or stenographer, he does not have the authority to exceed the stated maximum of three thousand dollars. If additional clerks, deputy clerks, or other employees are required in order to conduct the business of the court, the authority to provide, the discretion as to whether they shall be provided and the amounts to be paid in excess of three thousand dollars is vested in the county court under Subsection 2 of Section 483.475, supra.

Honorable David L. Colson

CONCLUSION

It is the opinion of this office that the probate judge in a county having more than thirty thousand and less than seventy thousand inhabitants, with an assessed valuation of over thirty million dollars, may pay up to, but not in excess of, three thousand dollars in any one calendar year for clerk hire.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

Enc.

TAXATION:
COUNTY BOARD OF
EQUALIZATION:



In performing its duties a county board of equalization cannot reduce the aggregate assessed valuation of property within the county below the aggregate assessed valuation thereof, as fixed and determined by the State Tax Commission for the same year.

May 8, 1957

Honorable David L. Colson
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Mr. Colson:

Reference is made to your request for an official opinion, which request reads as follows:

"The County Superintendent of Schools of St. Francois County has requested me to write to you in regard to an Official Opinion on the following question:

"Legality of County Board of Equalization to reduce the total assessed valuation to a point below the level set by the State Board."

For a more complete understanding of the question presented, we wish to refer very briefly to the statutory scheme for the assessment of property for the purpose of taxation.

Section 137.115, RSMo Cum. Supp. 1955, provides that between the first day of January and the first day of June of each year the assessor shall proceed to assess all real and tangible personal property at its true value in money.

Section 137.080, RSMo 1949, provides that real property shall be assessed at the assessment which shall commence on the first day of January, and shall be required to be assessed every year. Thus it is seen that the assessor is required to make an annual assessment. Each assessment is the basis for that year's taxes, and is separate and apart from every other year's assessment. When the assessor has completed his labors he is required to make a return to the county court on or before the 31st day of May of each year a fair copy of the assessor's book, verified by his affidavit annexed thereto. Section 137.245, RSMo 1949.

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Immediately thereafter, and prior to the 20th day of June, the clerk of the county court is required to make an abstract of the assessment book, showing the aggregate footings of the different classes, so as to set forth the aggregate amount of the different kinds of real and tangible personal property and the valuation thereof and forward the same to the State Tax Commission. Section 137.245, RSMo 1949.

Section 138.010, RSMo 1949, provides that the county board of equalization shall meet on the second Monday in July of each year. Said board is charged with the duty of equalizing the valuation and assessments upon all taxable real and tangible personal property within the county, so that all such property shall be entered on the tax book at its true value. Sections 139.030 and 138.040, RSMo 1949.

Section 138.390, RSMo 1949, provides that the State Tax Commission shall meet between the dates of June 20th and the second Monday in July of each year, for the purpose of adjusting and equalizing the valuation of real and tangible personal property among the several counties in the state.

Thereafter, under the provisions of Section 138.400, RSMo 1949, it is the duty of the secretary of said Commission to transmit to the county clerk on or before the second Monday in July a report showing the per cent added to or deducted from the valuation of the property of the several counties, which report shall include the per cent added to or deducted from the several classes of real and tangible personal property and the value of the real and tangible personal property of each county as equalized by said Commission. The county clerk is required to furnish a copy of said report to the county board of equalization.

The functions of the county board of equalization and the State Tax Commission are wholly separate and distinct. First Trust Co. v. Wells, 23 SW2d 109. The county board of equalization is charged with the duty of intracounty equalization, whereas it is the duty of the State Tax Commission to effect intercounty equalization. Each is required to perform its duties annually.

Turning now to the question at hand, Section 138.030, RSMo 1949, provides that the county board of equalization in performing its duties shall not reduce the valuation of the real or tangible personal property of the county below the value thereof as fixed by the State Tax Commission. Said section more fully provides in part as follows:

Honorable David L. Colson

"2. Said board shall have the power and the duty to hear complaints and to equalize the valuation and assessments upon all taxable real and tangible personal property within the county so that all such property shall be entered on the tax book at its true value; provided, that said board shall not reduce the valuation of the real or tangible personal property of the county below the value thereof as fixed by the state tax commission."

Referring to this section, the Supreme Court of Missouri, in the case of State v. Bethards, 9 SW2d 603, stated:

"That section means, if anything, that the state board of equalization fixes values as well as the assessor or the county board. Therefore the county board of equalization of Shelby county had no authority to reduce the valuation fixed by the state board. When it attempted to equalize the values in accordance with the prior valuations fixed by the assessor, which valuations had been annulled by the order of the state board of equalization, the proceeding was a nullity. The entire proceeding of the county board in the matter was of no effect. Mercantile Trust Co. v. Schramm, 269 Mo. 489, 190 S.W. 886."

See also the cases of State v. Dirckx, 11 SW2d 39, and First Trust Co. v. Wells, 23 SW2d 108.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that in performing its duties a county board of equalization cannot reduce the aggregate assessed valuation of property within the county below the aggregate assessed valuation thereof, as fixed and determined by the State Tax Commission for the same year.

Honorable David L. Colson

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/ld

FORFEITURE OF In proceeding upon a forfeiture of a recognizance,
RECOGNIZANCE: Supreme Court Rule 32.12 should be followed rather
than Section 544.640, RSMo 1949.



June 6, 1957

Honorable James A. Cole
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Mr. Cole:

Your recent request for an official opinion reads:

"I request an Attorney General's opinion on the following fact situation involving Supreme Court rule Number 32.12 and Section 544.640, 544.650, and 540.660 of R. S. Mo. 1949.

"The facts pertaining to these sections are as follows:

The defendant was arrested under warrant issued upon the information of the Prosecuting Attorney for the crime of issuing an insufficient funds check. The matter was filed directly in the Magistrate Court. The defendant waived jury and the matter was presented to the Court and the defendant found guilty and punishment assessed at 6 months in the Franklin County jail and a fine of One Hundred (\$100.00) Dollars together with the costs. Thereafter, and within time, the defendant appealed the judgment of the Magistrate Court and an appeal was taken to the Circuit Court of Franklin County, Mo. There the defendant gave a new bond in the amount of Three Thousand (\$3000.00) Dollars. The cause was set for trial and upon date of setting defendant waived the jury and the matter proceeded to trial and the defendant was found guilty in the Circuit Court and punishment was assessed at Nine (9) months in the Franklin County jail and

Honorable James A. Cole

finned in the sum of Two Hundred (\$200.00) Dollars. Thereafter, within time, defendant filed a motion for a new trial and within Ninety (90) days said motion was overruled by the Circuit Court of Franklin County. In due time, the defendant appealed the case to the St. Louis Court of Appeals. After expiration of the time to perfect appeal to the St. Louis Court of Appeals, the St. Louis Court of Appeals dismissed the Appeal of the defendant on its own initiative for failure of Appellant to perfect the appeal and comply with the rules. The dismissal of the St. Louis Circuit Court of Appeals is as follows:

CAPTION OMITTED

'Now at this day, it appearing to the Court that the Appeal from the judgment of conviction entered herein by the Circuit Court of Franklin County on April 27, 1956, has not been perfected within the time prescribed by law and the rules of Court, it is ordered by the Court of its own initiative that said appeal be and the same is hereby dismissed for failure of Appellant to perfect the Appeal and to comply with the rules; and that said Appellant pay the costs of this Appeal.'

"The Defendant is at the present time serving a sentence in St. Louis City.

"The Circuit Court of Franklin County has entered a forfeiture of recognizance.

"The question involved is whether to proceed solely under Supreme Court rule 32.12 by now filing a motion for judgment on the default and forfeiture or whether to follow 544.640 and have a Writ of Scire Facias issued.

"I would appreciate you advising as to the procedure to be followed in the forfeiture of this recognizance."

All references to statutes herein are to RSMo 1949 unless otherwise indicated.

Honorable James A. Cole

Section 5 of Article V of the Constitution of Missouri places broad rule making power in the Supreme Court of Missouri as to practice and procedure. That section reads:

"The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose."

In regard to this matter, the Missouri Supreme Court, in the case of State v. Robbins, 269 S.W. 2d 27, at l.c. 29, has stated:

"By order of this court, en banc, on April 14, 1952, rules of criminal procedure were adopted, effective January 1, 1953, pursuant to authority granted by Article V, §5, of the Missouri Constitution of 1945, V.A.M.S.; and, by order of this court on December 8, 1952, effective January 1, 1953, Supreme Court Rule 1.34 was rescinded and it was reiterated that 'appeals in criminal cases from and after January 1, 1953 (shall) be governed by the provisions of Rules 28.01 to 28.17'. Since defendant in the instant case sought to take an appeal from the final judgment rendered on January 21, 1953, the question as to whether a valid appeal was taken in this case, and therefore, whether this court has jurisdiction to hear the cause on appeal must be determined under Supreme Court Rule 28.03, the pertinent portion of which is as follows: 'After the rendition of final judgment in any criminal case, the defendant shall be entitled to take an appeal as provided in these Rules. An appeal shall be taken by filing a notice of appeal in the same manner and within the same time after final judgment as provided for civil cases.' * * *."

In regard to the effect that a Supreme Court Rule has when it is in conflict with a statute on the same subject, we direct attention to the following article by John Gibson and Jerome W. Seigfreid in 19 Mo. Law Review 70. At l.c. 73, the article reads:

Honorable James A. Cole

"The Missouri Supreme Court has often stated that in construing the Constitution, primary stress will be placed on the natural and ordinary meaning of the words. The plain meaning of the language, however, furnishes only doubtful assistance in determining the effect of the rules on the statutes. It would seem, however, that the restrictions placed on the rule making power indicate that where the court may make rules, the statutes will be superseded. The Constitution carefully excepts substantive rights, evidence law, oral examination of witnesses, juries, the right to trial by jury and the right of appeal from the authority of the court to change in any way, and any changes relating thereto must come from the legislature, where there is no other conflicting Constitutional provision. The subject matter of the rule making power is thus closely confined, and the inference would be that the court has full authority in the restricted sphere in which it can operate. This view is further strengthened by the power vested in the legislature to annul or amend any rule by law. It would seem that the reservation of the veto power must mean that, until the legislature acts, the rules of the court will be of controlling force, even though they are in conflict with existing statutes. Thus the inference is strong, from the restricted grant of the rule making power that the plain meaning of the Constitutional provision intended that the rules would replace the statutes."

From the above, it would appear to be perfectly plain that a Supreme Court Rule takes precedence regardless of any statutes upon the same subject so long as the Supreme Court Rule is within the boundaries of the Constitutional grant of authority set forth above found in Section 5 of Article V of the Missouri Constitution.

Section 544.640, to which you refer, reads:

"If, without sufficient cause or excuse, the defendant fails to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the fact to be entered upon its minutes, and thereupon the

Honorable James A. Cole

recognizance is forfeited, and the same shall be proceeded upon by scire facias to final judgment and execution thereon, although the defendant may be afterward arrested on the original charge, unless remitted by the court for cause shown."

Rule 32.12 of the Supreme Court reads:

"If there is a breach of condition of a bond, the court in which a criminal case or proceeding is then pending shall declare a forfeiture of the bail. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the court in which the defendant is required to appear under the condition thereof and in which a prosecution is or may be pending against the defendant and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses."

From the above, it will be seen that a different procedure in the matter of forfeiture is set forth in Rule 32.12 than in Section 544.640. On the basis of our reasoning above, in this situation, you should follow rule 32.12.

CONCLUSION

It is the opinion of this department that in proceeding upon a forfeiture of a recognizance that Supreme Court Rule 32.12 should be followed rather than Section 544.640, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

INSURANCE: Pre-arranged funeral contract described in opinion is a contract of insurance and offering of the same to the public without meeting licensing requirements of Missouri's insurance code violates Sections 375.300 and 375.310 RSMo 1949.



June 10, 1957

Honorable David L. Colson
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Mr. Colson:

The following opinion is rendered in reply to your request reading as follows:

"A perplexing problem has developed here in St. Francois County concerning a practice which has been carried on for many years by several funeral directors. The problem concerns the practice of pre-arranged funeral contracts sold by certain St. Francois County funeral directors.

"Please find enclosed herein a photostatic copy of one such contract, sold by the Sparks Funeral Home, accompanied by a photostatic copy of certain checks and receipts for payment on said contracts.

"It is my understanding that these contracts are a violation of the Statutes of Missouri. I would appreciate it very much if you would favor me with an early opinion as to the legality of this type of contract."

Provisions of the sample contract referred to in your letter quoted above are set out in full in order that no doubt will be entertained as to the contract provisions to which this opinion is addressed. We quote the sample contract in the following language:

Honorable David L. Colson

"\$500.00

"PREARRANGED FUNERAL SERVICE CONTRACT

"This agreement made by and between the undersigned first party, and Murphy L. Sparks and Donald P. Sparks d-b-a Sparks Funeral Home, second party, WITNESSETH:

"WHEREAS the parties hereto are desirous of making provisions for proper funeral services and the payment therefor, NOW THEREFORE in consideration of the premises and the mutual promises hereinafter expressed it is hereby agreed as follows:

"1. The first party shall and will pay to the second party the sum of Five Dollars upon the signing of this agreement and Two Dollars on the first of each and every month thereafter.

* will receive metal casket on this contract

"2. Upon the death of the first party while this agreement is in force and provided that funeral services for said first party are rendered by the second party, the second party will credit and deem paid its charges for the casket and wood box used for such services to the extent of Five Hundred Dollars if said first party is 15 years old or over at the time of death, or Two Hundred Dollars if first party is 10 years old but less than 15, or One Hundred Dollars if first party is less than 10 years old. It is expressly agreed and understood that this credit shall not apply to charges for professional services, embalming, vault, burial clothing, telephone and telegraph, hearse and flower car, death notices, flowers, opening of grave or cemetery lot.

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"3. The second party will provide free emergency ambulance service to transport the first party to any local hospital.

"4. Should the first party fail to make any payment when due, Sections 2 and 3 shall become inapplicable and of no force and effect, but should the first party at any time prior to his death pay all past due payments, Sections 2 and 3 shall again become applicable and of full force and effect.

"5. This agreement shall become effective upon payment of the initial payment by the first party and upon the signing of the parties hereto.

"SPARKS FUNERAL HOME..FLAT RIVER & BONNE TERRE, MO.

"IN WITNESS WHEREOF the parties hereto have hereunto set their hands this 10 day of February, 1954.

"SPARKS FUNERAL HOME, by Walter E. Jahn

" Everett Sparks Maggie Jahn

Sec
Second Party First Party "

* Underscored provision supplied by interlineation.

Section 375.300 RSMo 1949, provides:

"Any person or persons who in this state shall act as agent or solicitor for any individual, association of individuals or corporation engaged in the transaction of insurance business, without such person or persons first having obtained from the superintendent of the insurance division of this state the certificate authorizing him to act as such agent or solicitor, as required by section 375.010, or who shall act as agent or solicitor for any individual, association of individuals or corporation engaged in

Honorable David L. Colson

insurance business, before such individual, association of individuals or corporation shall have been duly authorized and licensed by the superintendent of the insurance division of this state to transact business in this state, or after such license has been suspended, revoked, or has expired, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than ten nor more than one hundred dollars for each offense, or imprisoned in the county or city jail for not less than ten days nor more than six months, or by both such fine and imprisonment."

Section 375.310, RSMo 1949, provides in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * *."

In State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 165 S.W. 1084, 257 Mo. 529, 1.c. 535, the Supreme Court of Missouri spoke as follows:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, 1.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539.) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer,

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binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him."

In the case of *State ex inf. v. Black*, 145 S.W. (2d) 406, 347 Mo. 19, 1.c. 24, the insurance character of burial associations was alluded to in the following language:

"The insurance character of this business is recognized by the provision of the act exempting such associations from the general insurance laws."

The insurance character of burial associations is also attested by the following language found in Section 376.020, RSMo 1949, of Missouri's regular life insurance company law:

"* * * provided, that any association consisting of not more than one thousand five hundred citizens, residents of the state of Missouri, all living within the boundaries of not more than three counties in this state, said counties to be contiguous to each other, organized not for profit and solely for the purpose of assessing each of the members thereof upon the death of a member, the entire amount of said assessment, except ten cents paid by each member, to be given to a beneficiary or beneficiaries named by the deceased member in his or her certificate of membership, said certificate of membership to be issued by such association, shall not be construed to be life insurance company under the laws of this state, * * *."

At 44 C.J.S., Insurance, Sec. 27, we find the subject of burial benefit treated as follows:

"'Burial benefit' or 'funeral benefit' has been regarded as life insurance."

In the footnote to the texts of C.J.S., just quoted, we are cited to the case of *State ex rel. Reece v. Stout*, 17 Tenn. App., 65 S.W. (2d) 827, in which case the following language is found at 65 S.W. (2d) 827, 1.c. 829:

Honorable David L. Colson

"Burial or funeral benefit, being determinable upon the cessation of human life, and dependent upon that contingency, constitutes life insurance. Such a contract has, however, been held void as against public policy and in restraint of trade, where, although the purpose of the association was to provide, at their death, a funeral and proper burial for the members, the association was organized on the mutual plan, the members contributing a stipulated sum weekly, and the funeral, certain funeral furnishings, and outfit were to be furnished, by and through a designated undertaker, or official undertaker."

In the case of Knight v. Finnegan (D.C. Mo.) 74 F. Supp. 900, the Court, in the course of defining life insurance, spoke as follows at 74 F. Supp. 900, l.c. 901:

"Moreover, the elements and requisites of an insurance policy are, among others, 'a risk or contingency insured against and the duration thereof.' 'A promise to pay or indemnify in a fixed or ascertainable amount.'"

Summarizing the essential provisions of the contract quoted above, it is noticed that whatever payments are made by the first party while the contract is in force will merely be credited against the agreed value of the casket to be furnished; that amounts so paid may or may not have any true relation to the agreed value of the casket, depending on the cessation of human life, which is the only way to terminate payments under the contract and still receive its full benefits; that the schedule of payments would require more than twenty years' payments to equal the value of a casket worth five hundred dollars; and that even though the first party should die three months after signing the contract the second party would, under applicable provisions of the contract, be obligated to furnish a casket worth five hundred dollars. Hence, we have present in the contract the element of "risk" essential to an insurance contract.

CONCLUSION

It is the opinion of this office that the pre-arranged funeral service contract fully described in the foregoing opinion is a contract of insurance within the meaning of the

Honorable David L. Colson

language contained in Section 375.310 RSMo 1949 and offering of the same to the public without meeting requirements of Missouri's laws relating to organization and regulation of insurance companies will cause persons so offering such contract to be subject to the penalties prescribed by Sections 375.300 and 375.310 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:hw

INSANE PERSONS:
EXAMINATION BY
PHYSICIANS:

Probate Court may compel alleged insane persons to submit to an examination by a physician following an application for involuntary hospitalization.



June 17, 1957

Honorable James A. Cole
Prosecuting Attorney
Franklin County
Union, Missouri

Attention: Mr. Charles E. Hansen
Assistant Prosecuting Attorney

Dear Sir:

In your letter of May 3, you wrote as follows:

"Proceedings have been commenced by the husband of the proposed patient under Section 202.807. Notice thereof has been given to the proposed patient by the Sheriff. Two doctors were appointed to examine the proposed patient. The doctors have reported to the Judge that they are unable to examine the proposed patient, because upon their appearance at her residence, she locks herself in her room.

"The problem thus arises as to what power the Probate Judge has to cause her to submit to examination. Or can the Judge proceed with the hearing under Section 202.807(6), if the doctors report the proposed patient will not permit them to examine her.

"If the original petition in the case states that the proposed patient is in such condition that she is liable to cause injury to herself or others, could the Judge empower the Sheriff to detain the proposed patient in a suitable place, thereby making it

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possible to obtain an examination of the proposed patient. This would not comply with Section 202.800 because of the absence of a statement from a doctor, because none has been able to examine her, to determine if she is at the present time dangerous to herself,"

Section 202.807, RSMo Cum.Supp. 1955, it seems to us, contemplates an examination by two licensed physicians (in addition to the one whose certificate accompanies the application, if one does accompany it), before a judicial proceeding shall continue.

It certainly isn't clear what exactly was contemplated by the legislature in this section. In subsection 1 there is the provision that an application may state that the proposed patient has refused to submit to an examination. In subsection 3 there is a provision for the two court appointed physicians to examine. Apparently, as we have said, these two are to be appointed by the court even if one physician has examined the proposed patient prior to the application. Apparently, too, they are "to examine the proposed patient" whether he acquiesces or not.

We think the court has the inherent power to authorize the sheriff or other police officers to use the force necessary to aid the court appointed physicians in making the examination. We know of no rights of the individual that would be violated by compelling him to submit. Subsection 3 of Section 202.805, RSMo Cum. Supp. 1955, states that the probate court shall order "all preliminary acts required by section 202.807 be performed before the hearing." This indicates that the legislature apparently considered that the court could compel the proposed patient to be examined.

Section 202.820 states categorically that the patient shall be examined by the hospital staff as soon as practicable. Certainly, there the examination was contemplated by the legislature without any regard whatsoever to the patient's desires.

There are ample provisions throughout Chapter 202 for the individual to have an examination if he demands it or someone demands it for him following his commitment by means

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of the emergency procedures.

Enclosed is an opinion dated September 29, 1955, to the Honorable Gordon R. Boyer which shows that this office is of the opinion that the 1955 Act meets the objections the court had to the 1953 Act in the case of State v. Mullinax, 364 Mo. 858, 269 S. W. 2d 72.

CONCLUSION

It is our opinion that the probate court has the authority to compel an alleged mentally ill person to submit to an examination in a hearing to determine the truth regarding his illness following any application for his involuntary hospitalization.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Yours very truly,

John M. Dalton
Attorney General

RSN:hw:lc

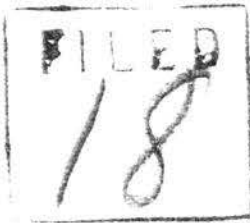
1 enclosure

TAXATION:

COUNTY COURTS:

COUNTY BOARDS OF EQUALIZATION:

The county court or county board of equalization cannot reassess real estate and tangible personal property or abate taxes arising by virtue of a regular and proper assessment where subsequent to the assessment date the property is totally or partially destroyed.



June 28, 1957

Honorable David L. Colson
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Mr. Colson:

Reference is made to your request for an official opinion which request reads as follows:

"Several requests have been made to the County Court, St. Francois County, Missouri, for tax relief for those persons whose property was destroyed in the tornado area. In particular, the Citizen's Committee of the Desloge-Cantwell Area are hoping that the taxes of those persons involved can be reduced for the year 1957.

It is my understanding from a reading of the statutes that their taxes are based upon the assessment made although their property is at a later time destroyed.

These people have been informed that there will be an adjustment in future years but that no adjustment can be made for the current year.

I would appreciate an early opinion from your office concerning the answer to this problem.

Section 137.075, RSMo 1949, provides that every person owning property on the first day of January shall be liable for taxes thereon during the same calendar year. Said Section more fully provides as follows:

Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year.

Honorable David L. Colson

It would seem to be clear from the above Section that the date for determining liability for taxes is fixed at January 1. In the case of Collector of Revenue vs. Ford Motor Company, 158 Fed. 2d 354, the court stated:

"The tax is not dependent on continual ownership but on ownership at the assessment date.

See also St. Louis Provident Association vs. Gruner, 355 Mo. 1030, 199 SW2d 409, and McLaren vs. Sheble, 45 Mo. 130. In the latter case the court held that the statutory lien for taxes relates back to and takes effect from the inception point of the assessment although the assessment may not be consummated until a later day or month in the year.

Section 137.080, RSMo 1949, fixes the inception point of the assessment as follows:

"Real estate shall be assessed at the assessment which shall commence on the first day of January, 1946, and shall be required to be assessed every year thereafter."

In the case of State ex rel vs. Edwards, 136 Mo. 360, the court stated at l.c. 368 and 369:

"In assessing property the owner is required to list the property owned by him on the first day of June of the year the assessment is made, and the value is placed upon it by the assessing officers as it was on that day. The work of the assessor can not be done in one day, and he is given from the first day of June to the first day of January in which time he is required to complete the assessment. But the details of the assessment, when completed, relate back to the first day of June, and must be taken as of that day, otherwise serious complications might arise as is shown in this case.

Under date of September 6, 1951, this office issued an official opinion to Clarence Evans, Chairman of Missouri State Tax Commission, holding that said Commission has no authority to abate taxes on property duly assessed but which was subsequent to that date partially or wholly destroyed. A copy of said opinion is enclosed herewith.

Honorable David L. Colson

We are of the opinion that the same result would be obtained in regard to the county court or the county board of equalization. We have examined in detail the statutes relating to the powers and authority of the county court and county board of equalization and are unable to find any authority for either of said bodies to reassess real estate or abate taxes arising by virtue of a regular and proper assessment where such property has been, subsequent to January 1, destroyed or partially destroyed by act of God.

CONCLUSION

Therefore, in the premises it is the opinion of this office that the county court or county board of equalization cannot reassess real estate and tangible personal property or abate taxes arising by virtue of a regular and proper assessment where subsequent to the assessment date, the property is totally or partially destroyed.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

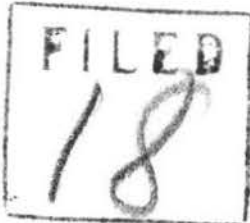
Very truly yours,

John M. Dalton
Attorney General

EDG:lgure

NEWSPAPERS:
LEGAL PUBLICATION:

Requirements of Section 493.050, RSMo 1949, that a newspaper be entered as second class matter at post office in publication city, and that a newspaper shall have been legally and consecutively published for three years, means three years from date first issue was actually published, and not three years from date second class permit was issued. A weekly newspaper which actually began legal and consecutive publication on June 11, 1954, and has continued uninterruptedly to the present, but obtained postal permit on October 11, 1954, three year publication period began June 11, 1954 and not on October 15, 1954. If newspaper has complied with other requirements of said statute, it is qualified to publish all legal notices as of June 11, 1957.



July 2, 1957

Honorable J. W. Colley
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Mr. Colley:

This is to acknowledge receipt of your recent request for a legal opinion reading as follows:

"The probate Judge of Dade County, Missouri, has asked me to secure an opinion from your office concerning Section 493.050, Missouri Revised Statutes of 1949.

"It appears that one of our local newspapers began regular and consecutive publication of his newspaper on June 11, 1954, and completed a three year period on June 11, 1957. Said newspaper also has a list of bona fide subscribers voluntarily engaged as such, who have paid or agreed to pay a stated price for a subscription for a definite period of time. From June 11, 1954, and for four months thereafter this newspaper was mailed under a third class postal permit. After that time the editor secured a second class permit and has been operating under such permit since.

"This question has been raised; does the three year period of regular publication begin October 15, 1954 (the date the second class permit was authorized) or the date of June 11, 1954, when the actual three year period of consecutive publication began?

Honorable J. W. Colley

"It seems to me as if this section of the Statute merely requires a second class permit be in effect at the time the three year period of regular and consecutive publications have been completed.

"I will appreciate an opinion from your office so that I may correctly advise the Probate Judge of Dade County."

Section 493.050, RSMo 1949 referred to in the opinion request reads as follows:

"All public advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate, shall be published in some daily, triweekly, semiweekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of three years; shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or agreed to pay a stated price for a subscription for a definite period of time; provided, that when a public notice, required by law, to be published once a week for a given number of weeks, shall be published in a daily, triweekly, semiweekly or weekly newspaper, the notice shall appear once a week, on the same day of each week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this section; provided further, that the duration of consecutive publication herein provided for shall not affect newspapers which have become legal publications prior to the effective date of this section; provided, however, that when any newspaper shall be forced to suspend publication in any time of war, due to the owner or publisher being inducted into the armed forces of the United States, the same may be reinstated within one year after actual

Honorable J. W. Colley

hostilities shall have ceased, with all benefits under the provisions of this section, upon the filing with the secretary of state of notice of intention of said owner or publisher, his widow or legal heirs, to republish said newspaper, setting forth the name of the publication, its volume and number, its frequency of publication, and its readmission to the post office where it was previously entered as second class mail matter, and when it shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for subscription for a definite period of time. All laws or parts of laws in conflict with this section except sections 493.070 and 493.120, are hereby repealed."

The qualifications of a newspaper for publishing advertisements and notices required by law to be published as set out by this section are:

- 1) A general circulation in the county in which the newspaper is located and shall have been admitted to the post office as a second class matter in the city of publication.
- 2) The newspaper shall have been published regularly and consecutively for a period of three years.
- 3) It shall have a list of bona fide subscribers voluntarily engaged, who have paid or agreed to pay, a stated subscription price for a definite period of time.

As we understand the opinion request, the inquiry is whether the three year period of regular and consecutive publication of the newspaper began on October 15, 1954, when the second class permit was authorized, or on June 11, 1954, when the actual three year period of consecutive publication began.

We have been informed the newspaper referred to above is a weekly newspaper and has been published as such continuously from June 11, 1954 to and including the present time.

Since no question has been raised with reference to the qualifications of the newspaper referred to, except as to those mentioned in the opinion request, for the purpose of our discussion it will be assumed that such newspaper has met

Honorable J. W. Colley

all the other requirements mentioned in the statute.

From the wording of Section 493.050, supra, it is obviously the legislative intent that in order to be a legal publication within the meaning of the statute, a newspaper must comply with each qualification or requirement therein set out, and that it must have met all of said qualifications on any date it attempts to publish a legal advertisement or notice of any kind. This principle was declared to be the law in *State ex rel v. Thomas*, 203 Mo. App. 452 at l.c. 458:

"The material consideration was whether the newspaper is a daily newspaper at the time the notices are to be inserted. It, manifestly, would not be material whether the paper was a newspaper before the work was actually to be done by it for the reason that it might be a daily newspaper at the time the bids were submitted or the contract let and might not be one during the time the insertions were to be made in it. We do not think that the Legislature was concerned with the question as to whether the newspaper should be a daily newspaper at any time other than when the work of publishing the notices was to be performed. For these reasons we think that there was a valid letting of the contract, or, at least, that the board did not abuse its discretion in letting the contract to a newspaper such as the successful bidder in this case."

If the newspaper referred to had been published regularly and consecutively as a weekly for a period of three years, beginning on June 11, 1954, had been entered as a second class matter in the city of publication on that date, and assuming it had complied with the other statutory requirements as previously stated, then it would unquestionably have been qualified to publish legal notices on June 11, 1957. However, if the three year period of publication did not begin until October 15, 1954, when the second class permit was authorized, then the newspaper could not print legal notices until October 15, 1957.

The factual situation leads to the inquiry as to just when the regular and consecutive publication would begin and end in order for the newspaper to be qualified to print legal notices,

Honorable J. W. Colley

and what, if any bearing would the issuing of the postal permit have on the beginning of the three year period. This question, as well as the specific one propounded in the opinion request, can be accurately answered only by reference to the particular qualifications set out in Section 493.050, supra, and a determination from the language expressed therein what the legislative intent was with reference to such subject matter.

Upon a careful examination of the statutes we find no indication of a legislative intent to use the words in a technical sense, therefore according to the rules of statutory construction, it is presumed that the language used in said section has been used in its plain and ordinary sense.

Another rule of statutory construction not so familiarly known, but which we find to be particularly helpful in the present instance, is that announced in *Nordberg v. Montgomery*, 351, Mo. at 180, by the court at l.c. 185:

"The 'several parts, or sections, of such a statute are to be construed in connection with every other part, or section, and all are to be considered as parts of a connected whole, and harmonized, if possible, so as to aid in giving effect to the intention of the lawmakers.' *State ex rel. Dean et al. v. Daues et al.*, 321 Mo. 1126, 14 S.W. (2d) 990, l.c. 1002. See, also, *Holder v. Elms Hotel Co.*, 338 Mo. 857, 92 S.W. (2d) 620, 104 A.L.R. 339; *State ex rel. Kansas City Power & Light Co. v. Smith*, 342 Mo. 75, 111 S.W. (2d) 513; *State v. Wipke*, 345 Mo. 283, 133 S.W. (2d) 354; *State ex inf. McKittrick v. Carelene Products Co.*, 346 Mo. 1049, 144 S.W. (2d) 153."

Applying such rules of construction to the statutory qualifications under consideration, that a newspaper shall have been admitted to the post office as second class matter in the city of publication and that the paper shall have been published regularly and consecutively for a period of three years, it is noted these requirements are separate and distinct and are not dependent on each other; for example, that within the meaning of these statutory requirements a newspaper shall not be deemed to have begun its three year regular publication period until the date when the second class postal permit was authorized. It is also noted that either or both of these separate requirements expressly or by necessary implication fail to indicate any particular time or any other preliminary requirement shall have

Honorable J. W. Colley

been met at the beginning of the three year publication period.

If the statutory three year period did not begin until the date of issuance of the postal permit, then this would have the inescapable effect of requiring the paper to have the permit in effect during the entire three year period.

It seems to us that if the law makers had intended to place any further restrictions in this particular on newspapers, then they would have expressly so provided in the statute, or at least would have used language therein from which it must necessarily be implied any further requirements of this or a similar nature should be complied with. However, we fail to find any qualifying language of this nature in the statutes.

Rather it appears to be the more reasonable construction of these statutory requirements, and the one more nearly in accord with the apparent legislative intent, that the regular and consecutive publication of a newspaper for a period of three years, can mean only one thing in its plain and ordinary sense; namely, that the three year period shall begin on the date when the actual physical publication of the newspaper occurred, and that such publication, in the case of a weekly newspaper, shall have been continuously published once each week for a period of three years from the first publication.

In the absence of statutory provisions to the contrary we cannot do violence to same by writing something into the statute which is not there, the effect of which would be that it was the legislative intent the three year period shall begin from the date the newspaper had obtained its second class postal permit. Therefore, it is believed that a newspaper may obtain its second class permit at any time within the three year publication period and before the end of such publication period. If it follows such procedure, such newspaper will have sufficiently complied with this portion of the statute.

In view of the foregoing it is our thought that the three year regular and consecutive publication period of the newspaper, referred to in the opinion request, started on June 11, 1954 when the actual publication began, and not on October 15, 1954, when the second class post office permit was authorized.

If said paper has complied with all other requirements of Section 493.050, supra, on or before June 11, 1957, it is qualified to publish a legal advertisement required by law to be published, as of that date.

Honorable J. W. Colley

CONCLUSION

It is therefore the opinion of this department that the requirements of Section 493.050, RSMo 1949, that a newspaper shall have been entered as second class matter in the post office of the city of publication; and that a newspaper shall have been published regularly and consecutively for a period of three years, mean that a newspaper shall have been published regularly and consecutively for a period of three years from the date the first issue was actually published, and not three years from the date the second class postal permit was granted to such newspaper.

It is further the opinion of this department that where a newspaper actually began regular and consecutive publication on June 11, 1954, and continued thereafter without interruption until the present time, but did not obtain a second class postal permit in the city of publication until October 15, 1954, and if all other requirements of Section 493.050, RSMo 1949 have been complied with, its three year publication period legally began on June 11, 1954 and not on October 15, 1954 when its postal permit was authorized. Said newspaper has sufficiently complied with the statutory requirements and was authorized to publish all legal advertisements and notices as of June 11, 1957.

The foregoing opinion, which is hereby approved, was prepared by Assistant Attorney General, Paul N. Chitwood.

Yours very truly,

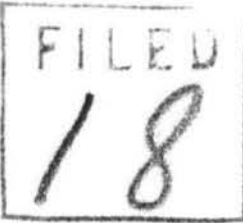
Robert R. Welborn
Assistant Attorney General, for

JOHN M. DALTON
Attorney General

PNC:db

LOTTERIES:

In the determination of the winner of a contest in which the winner is determined by the judgment of the comparative merits of statements within twenty-five words or less, which statements begin, "I like to trade at Crown Drug Stores because," they are determined upon skill, and not upon chance, and although such operation may entail the elements of consideration and prize, yet the operation is not a lottery within the meaning of lottery laws of Missouri inasmuch as the third and necessary element of chance is not present.



October 21, 1957

Honorable William A. Collet
Prosecuting Attorney
Jackson County
415 East 12th Street
Kansas City 6, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I am requesting herewith pursuant to a telephone conversation this afternoon with Mr. Williamson, an opinion as to the legality of a contest which is commencing in Jackson County, as shown by the enclosed advertisement in the Friday, October 4, Kansas City Star, and the enclosed entry blank, and contest rules.

"I have advised the general counsel of the Crown Drug Company, Mr. Alfred Kuraner, 937 Rialto Building, Kansas City, Missouri, of this request for an opinion. You will note that the contestant is required to answer true to a number of questions, and then finish in twenty-five words or less the following sentence 'I like to trade at Crown Drug Stores because - - -'. In this connection I would refer you to the last sentence of rule one of the contest rules, which states that 'if you are in doubt as to which statement is true or false', you may go to your nearest Crown Drug Store and examine the merchandise.

"You will notice also that one entry blank is given with each 25¢ purchase in a Crown Drug Store.

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"The essay sentence is by rule 7 to be judged on 'originality, sincerity, aptness of thought and expression'. I am advised by Mr. Kuraner, counsel for the Crown Drug Company, that according to the contest plan all entries are turned over to an independent contractor, Potts-Woodbury, Inc., the drug company's advertising agency, which advertising agency is instructed to judge the contest on the basis of the elements previously mentioned. It is the position of the drug company that they do not control in any way the selection of the winners.

"I would appreciate your opinion at your earliest convenience whether this contest violates the lottery laws of the State of Missouri."

To your opinion request you have attached what is labeled "OFFICIAL ENTRY BLANK - CROWN'S FAMOUS BRANDS 'True or False' CONTEST." Following this heading are eight rules which the contestant is advised to follow. Rules 1, 2, 3 and 4 read:

"1. Read all of the statements of each Famous Brand listed below and then mark an X in the square in front of the statement which is 'True.' By a 'True' statement we mean a statement which tells what the product is actually used for or a statement which describes the actual product. You must identify EACH 'True' Statement of EACH product to be eligible. If you are in doubt, as to which statement is 'True or False,' you may go to your nearest Crown Drug Store and examine the merchandise.

"2. After you have marked an X in the box in front of EACH 'True' statement then finish the statement, 'I like to shop at Crown because' in 25 words or less. Space for your statement is provided at the bottom of this entry blank.

"3. Print your name and address plainly in space provided at the bottom of this blank. Then drop your entry in the official entry box which is provided in all

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Crown Drug Stores. Do not attach letters, drawing or photographs of your entry.

"4. There is no limit as to the number of entries you may make; however, all entries must be on an official entry blank (one given with each 25¢ purchase) or on a facsimile thereof. An entry blank will be on display at all Crown Drug Stores at all times during the contest. Contest is subject to all Federal, State and Local Regulations. All entries must be original and in the contestant's own name."

Rule 7 reads:

"7. All entries will FIRST be judged as to the correctness of the marked by X 'True' statements. If every 'True' statement of EVERY product is correct, then the statement 'I like to shop at Crown because' will be judged. This statement will be judged on originality, sincerity, aptness of thought, and expression. All judging will be made by Potts-Woodbury, Inc., Advertising Agency and the decision of the judges will be final. Duplicate prizes will be awarded in case of ties. Fancy entries will not count extra. No entries will be returned and no correspondence will be entered into in regard to this contest. Entries, contents and ideas therein become the property of the Crown Drug Company and can be used as it sees fit."

The first three true or false statements are set forth here in order that their character may be perfectly understood. They are:

- "() SILICARE A Medicated Dandruff Treatment
- () SILICARE A Medicated Hand Lotion
- () PEPSI-COLA 'The Light Refreshment'
- () PEPSI-COLA 'Good for your Car'

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- () SHULTON SPRAYS 'For a Lovelier You'
- () SHULTON SPRAYS 'For all Household Pests'."

There are twenty-seven of these true or false questions, all of them relating to products sold at Crown Drug Stores. Following the last question, set forth in a box, is repeated the invitation set forth in Rule 1, above, which reads:

"If you are in doubt, as to which statement is 'True or False,' you may go to your nearest Crown Drug Store and examine the merchandise."

At the bottom of the page, also set forth in a box, is the statement:

"FINISH THIS SENTENCE IN 25 WORDS OR LESS...

I like to trade at CROWN DRUG STORES
because: . . ."

This statement is followed by four blank underscored lines, a space intended for the statement referred to above.

We now turn to the case of State ex inf. McKittrick v. Globe-Democrat Publishing Co., 341 Mo. 862. At l.c. 875 the Missouri Supreme Court stated:

"The elements of a lottery are: (1) consideration; (2) prize; (3) chance. It is conceded that the first two of these were present in the 'Famous Names' contest, here involved, the sole question being whether the third element - chance - was there. In England and Canada where the 'pure chance doctrine' prevails a game or contest is not a lottery even though the entrants pay a consideration for the chance to win a prize, unless the result depends entirely upon chance. In the United States the rule was the same until about 1904; but it is now generally held that chance need be only the dominant factor. [38 C.J., sec. 5, p. 291; 17 R.C.L., sec. 10, p. 1223; Waite v. Press Publishing Assn., 155 Fed. 58, 85 C.C.A.]

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576, 11 R.A. (N.S.) 609, 12 Ann. Cas. 319.] Hence a contest may be a lottery even though skill, judgment or research enter therein to some degree, if chance in a larger degree determine the result. Whether the chance factor is dominant or subordinate is often a troublesome question."

It will be noted from the above that the elements of a lottery are prize, consideration and chance. All three must be present if an operation is to be a lottery under Missouri law. We may state that the Globe-Democrat case has been followed by Missouri appellate courts since its rendition in 1937.

In the instant situation, the element of "prize" is obviously present. On the opposite side of the entry blank, from which we quoted above, there is a statement of the prizes which will be awarded the winners. The first prize is a 1958 Edsel car; the second is a \$750 bottle of perfume; the third is a \$645 Sylvania Color TV; and other prizes listed are referred to up to the number of near three thousand.

There can be no question but that the element of "consideration," as that term has been construed by Missouri courts, is also present. It will be noted from the contest rules, quoted above, that in order to enter the contest one must purchase some article at a Crown Drug Store for not less than 25¢. There must then be expended upon the entry form the work of marking the twenty-seven true or false statements. This, as is indicated by the contest rules, may necessitate another trip to a Crown Drug Store. There must then be written the little essay on why the contestant prefers Crown products. After this, the contest form must either be taken to a Crown Drug Store or mailed. As we stated above, all of this expenditure of money, time and effort clearly constitutes "consideration" as Missouri appellate courts have construed the meaning of that term.

There now remains the question of whether or not the third necessary element of "chance" is the dominant element in determining the winners. It will be remembered that in our quotation from the Globe-Democrat case the court stated that "a contest may be a lottery even though skill, judgment or research enter therein to some degree, if chance in a larger degree determine the result. Whether the chance factor is dominant or subordinate is often a troublesome question."

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We take the above to mean, conversely, that even though some element of chance may be present in a contest it will not be held to be "chance" if that element is subordinate and if skill is dominant.

We now come to the specific situation which you present. It will be noted that this contest consists of two parts. The first is the marking of the true or false statements. It will be noted that the rules state, both preceding the true or false statements and immediately succeeding them, that if a contestant is in doubt regarding the proper answer to any of the questions he may go to a Crown Drug Store and examine the product about which he is doubtful in order to determine the correct answer. We submit that this phase of the contest presents no element of chance. By the exertion of some effort, the contestant may determine with absolute finality the correctness of the true or false statements. Therefore, as we stated, we see no element of "chance" in the first part of the contest.

We now come to the second part, which is finishing the statement, in twenty-five words or less, "I like to trade at Crown Drug Stores because: . . ." Specifically, we have to determine whether the determination of the best statement is a matter of "chance" or of "skill."

In connection with this matter, we turn again to the Globe-Democrat case. At l.c. 876 the Missouri Supreme Court stated:

"Laying the foregoing cases aside for a minute, let us look at a few of the decisions cited by respondent which may be thought to face the other way. In Brooklyn Daily Eagle v. Voorhies (1910), 181 Fed. 579, it was held a contest for a prize for the 'best' essay upon the name of a certain breakfast food was not a lottery, and that advertisements thereof could be sent through the United States mail. The defendant postmaster contended the conditions of the contest did not specify in what respect the essays should be 'best' and therefore left it open to the whim of the judges - or chance. The opinion said, 'it must be held that to offer a prize for the "best" essay might be a lottery, if the persons are not induced to compete with some definite statement of what the word "best" means;' but

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ruled that sufficient appeared in the record to show definitely the contest was to be judged on the basis of literary merit for advertising purposes."

It will be noted that in Rule 7 of the Crown contest, set forth above, a definite standard is set up by which the statement is to be judged, to wit, "originality, sincerity, aptness of thought, and expression." Turning to the Brooklyn Daily Eagle case, referred to in the Globe-Democrat case, above, we find the following (181 Fed. 579, 1.c. 582):

"The government also contends that inasmuch as the advertisement does not specifically say that the essays shall be judged because of literary merit, but, on the other hand, offers a prize solely for the 'best' essay, which might be best written, best expressed, most persuasive, longest, shortest, or best from any other standpoint, the judging would depend upon the whim of the judges, and not upon their application of any recognized standard.

"It must be held that to offer a prize for the 'best' essay might be a lottery, if the persons are not induced to compete with some definite statement of what the word 'best' means. But a distinction as to the methods of the judges is academic, for if the contest be honestly carried on (and this is admitted), and the best essay from any definite known standpoint selected, such competition would not seem to be in any sense a lottery. The wording of the suggested advertisement is disconnected and does not definitely say that the merits of the breakfast food, rather than its title, are to be extolled; but the general sense indicates that literary merit for advertising purposes, as it might appear to the opinions of the three judges, would be the standard of judging."

In United States Supreme Court Reports (Annotated), 94 L. Ed. 73, following a discussion of operations which were held to be lotteries, we find the statement:

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"On the other hand, a bona fide contest for a competition in essays was held not to be a lottery, so as to come within the purview of the mail fraud statutes, in Brooklyn Daily Eagle v. Voorhies (1910, CC NY) 181 F 579."

In the case of Gilbert v. Houck Piano Co., 159 Ill. App. 347, the Illinois Appellate Court, in referring to a promotional scheme which consisted of a "word contest" which called for a statement as to the excellency of the pianos sold by the Houck Company, stated, l.c. 350:

"With the justice of the contract between plaintiffs and defendant we have nothing to do, nor have we with the merits or expediency of this method of advertising pianos. But the method is no more a lottery and depends no more on lot or chance than a distribution of school prizes does."

In the case of Lucky Calendar Co. v. Cohen, 120 A2d 107, l.c. 113, the Supreme Court of New Jersey stated:

"There can be no criticism of prize contests when they are truly contests of ability, and the best or superior entrants have a reasonable opportunity to be the winner. Prize contests, where the selection is based on adequate standards made known to the contestants and sought to be complied with by them and used to select the winner by judges whose qualifications have reasonable relation to the purpose to be achieved, are not illegal, Brooklyn Daily Eagle v. Voorhies, 181 F. 579 (C.C.E.D. N.Y. 1910). The ingredient of chance, so condemned in State v. Shorts, 32 N.J.L. 398 (Sup. Ct. 1868), where Chief Justice Beasley said at page 401: 'This ingredient of chance is, obviously, the evil principle against which all prohibitory laws are aimed,' and by this court in our recent decision in this case, is absent where there is an honest attempt to judge all entrants by reasonable criteria. The subjective involvement of the judge, unavoidable as it is in a great many of the cases where the standards to be applied require personal judgment, does not vitiate the choice as one of chance

selection, provided he has qualifications which reasonably indicate that the result reached by him generally would be concurred in by persons learned or experienced in the particular field involved. As an appropriate example we refer to a contest in our own profession, the Ross Prize Essay Contest, conducted annually since 1934 by the American Bar Association under the terms of the will of the late Judge Erskine M. Ross. The judges chosen are traditionally a practicing lawyer, a judge and a law teacher, and they do not select the winner by chance, 41 A.B.A.J. 823 (September 1955); see also *Blyth v. Hulton & Co., Ltd.*, (Ct. App. 1908), 24 T.L.R. 719, 72 J.P. 401, 52 S.J. 599, *Minges v. City of Birmingham*, 251 Ala. 65, 36 So. 2d 93 (Sup. Ct. 1948), and the illuminating discussion in *Contests and the Lottery Laws*, 45 Harv. L. Rev. 1196, 1210-1217.

"In *Blyth v. Hulton & Co., Ltd.*, supra, the English Court of Appeal had before it a very similar jingle contest. The defendants, who were proprietors of a weekly journal, announced that they would give a first prize of lb. 300 for the best last line in a limerick competition, a second prize of lb. 100 and two more prizes of lb. 50 each and in addition they would send a sovereign to each of the next 100 entries by way of consolations prizes. The express indication was that every coupon entry sent would be very carefully examined by a competent staff, and would be judged entirely on its merits and that the editor's decision would be final. The limerick there to be completed was:

'He wished her a happy New Year and
endeavored to make it quite clear that
her happiness lay in naming the day

.....'

"The winning line was:

'When the ring and the book should
appear.'

"When the winner was announced, the plaintiff, who had sent in a line identical to the one

chosen as the winner, but who had not been declared the winner, brought action to recover the amount of the prize. The court there held that in all the circumstances of the case the contest was a lottery, it being obvious that the selection of the winner, by reason of the greater than 60,000 entries, and the screening out process used to eliminate all but a select few, had to be made by chance and not merit. It particularly condemned the 100 consolation prizes as clearly contemplating distribution by chance. The elements of chance in the Lucky Calendar 'contest' are far greater than those condemned in the English case.

"In the 'Pepsi-Cola' case, *Minges v. City of Birmingham*, 251 Ala. 65, 36 So. 2d 93 (Sup.Ct. 1948), heavily relied upon by the plaintiff, the court found that there were definite known standards set up for judging the winners; that these standards were known not only to the participants but to the judges as well - factors absent in the case at bar - and that these were sufficient to remove the contest there from the 'odium of lotteries, gift enterprises, or schemes in the nature of lotteries.' Though it reached a different conclusion, the court in that case expressed the same view we adhere to in judging this case when it said:

'The standards set up for judging the monthly contest statements or compositions, as to why Pepsi-Cola hits the spot, are aptness, originality and interest. This can mean but one thing: the most apt, the most original and the most interesting, statement shall be adjudged the winner. The selections are to be made by the application of definitely known standards promulgated and announced for that purpose. That to prepare such a statement or composition requires the exercise of the judgment, skill, discretion and effort of the contestant, cannot be denied. And if the contests are honestly carried on and the best composition selected according to these known standards, the selections made are not the result of chance.' (36 So. 2d 93, at page 97.)"

Honorable William A. Collet

In view of the above, it is our belief that while there might be some element of chance, although we believe it to be very small, in determining the winner of the statement referred to above, such element is very subordinate and that the dominant element would be skill.

Therefore, we do not believe that the third necessary element, to wit, "chance," is present in the situation which you present, and that it therefore is not a lottery within the meaning of the Missouri lottery law.

CONCLUSION

It is the opinion of this department that in the determination of the winner of a contest in which the winner is determined by the judgment of the comparative merits of statements within twenty-five words or less, which statements begin, "I like to trade at Crown Drug Stores because," they are determined upon skill, and not upon chance, and that although such operation may entail the elements of consideration and prize, yet the operation is not a lottery within the meaning of the lottery laws of Missouri inasmuch as the third and necessary element of chance is not present.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ml

GAMBLING DEVICES:
PINBALL MACHINES:
MINORS:

A pinball machine which pays off only in free games is not a gambling device. No law which prohibits the playing of pinball machines by minors in Missouri.



January 24, 1957

Honorable George Q. Dawes
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Mr. Dawes:

This office is in receipt of your request for an opinion which reads in part as follows:

"I have been asked by Ogie Selinger, our sheriff, to obtain an opinion from you relative to pinball machines. It seems that some of the minors in this county play the pinball machines and the local minister I referred to is complaining about it.

"I would, therefore, appreciate an opinion from your office as to the legality of pinball machines that offer free games only as a reward for securing a certain number thereon. My opinion is that they are not illegal to have one in a place of business.

"Secondly, I would appreciate your opinion on whether or not minors playing such pinball machines and proprietors permitting them to play are violating the law. From what I could find I feel that this is not illegal either. However, in view of Section 318.090 restricting minors in the playing of gaming devices, I would like your opinion."

In regard to your first question, it is believed that the attached opinion to Honorable Edwin F. Brady, dated April 14, 1950,

Honorable George Q. Dawes

and the attached opinion to Ronald J. Fuller, dated September 15, 1949, completely answers the question as to free games being a prize in the three elements of lottery, consideration, chance and prize. The application of Section 318.090, RSMo 1949, has been considered in regard to the playing of pinball machines by minors. It is thought best for the purpose of this opinion to quote that section which is as follows:

"Every licensed keeper of any table mentioned in Section 318.010 who shall suffer any person under the age of twenty-one years to play on such table kept by him without the permission of the father, master or guardian of such minor first granted, shall forfeit and pay a fine of fifty dollars for every such offense, one-half of which shall be for the informer, to be recovered by a civil action."

It is necessary to quote Section 318.010, now amended as A. L. 1953, page 662, to which the above section may be deemed to refer. Said section reads:

"The county court shall have power to license the keepers of billiard tables and all similar tables upon which balls or cues are used. At each term, the clerk of said court shall prepare and deliver to the collector of their county, as many blank licenses for the keepers of such tables herein mentioned as the respective courts shall direct which shall be signed by the clerk and attested by the seal of the court."

The words expressly struck in the amending law from the former section were, "pigeonhole tables, jenny lind tables, and all other tables kept and used for gaming." The words added in lieu thereof are "and all similar tables." It is not believed that under either the old or the new sections the description is sufficient to include machines such as are referred to as "pinball machines" although balls are used in both such games and they may be equally said to be kept and used for gaming. It cannot be claimed, however, that there is any similarity between a cue and a pin. In prosecution for crime one of the cardinal rules is that stated in State v. Dougherty, 216 S.W. 2d. 467, 1.c. 471, 358 Mo. 734:

"Criminal statutes are to be construed strictly; liberally in favor of the defendant, and strictly against the state, both as to the charge and the proof. No one is to be made subject to such

Honorable George Q. Dawes

statutes by implication.' State v. Bartley,
304 Mo. 58, 263 S.W. 95, 96; State v. Taylor,
345 Mo. 325, 133 S.W. 2d. 336, 341.* * * * *"

In light of the above it is thought that Section 318.090, supra, cannot be deemed to provide a penalty or prohibit the use of pinball machines by persons under the age of 21 years. No legislative action in regard to such prohibition has been found.

CONCLUSION

Therefore, it is the opinion of this office that a pinball machine which pays off only in free games is not a gambling device.

It is the further opinion of this office that no law exists which prohibits the playing of pinball machines by minors in Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James W. Faris.

Yours very truly,

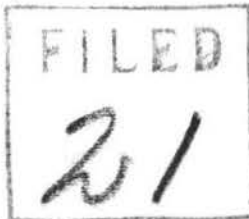
John M. Dalton
Attorney General

Enc. (2)

JWF:mw

SCHOOLS: Data on average daily attendance for school year 1956-1957 used in determining average daily attendance of proposed enlarged district submitted to voters as plan of county board of education when such plan is submitted to voters after June 30, 1957 and before July 1, 1958.

SCHOOL DISTRICTS:



November 27, 1957

Honorable Dick B. Dale, Jr.
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Mr. Dale:

This is in response to your request for opinion dated November 18, 1957, which reads as follows:

"Our County Superintendent of Schools, Mr. Otis L. Chandler, has asked me to request an opinion from your office concerning proposed enlarged school districts under sections 165.657 to 165.703, RSMo 1949.

"The question which concerns the Ray County Board of Education is, whether to use daily attendance data for the school year of 1956-57, in the preparation of a Ray County Board of Education plan to be submitted to the voters of the County, as provided by section 165.677.

"The facts leading up to this question are as follows:

June 1957 - Ray County Board of Education submitted proposed plan to the State Board of Education as provided by section 165.677, using daily attendance data for the school year 1955-56.

Subsequently, the Ray County proposed plan was not approved by the State Board of Education.

Within sixty days a revised plan was submitted by the Ray County Board of

Honorable Dick B. Dale, Jr.

Education to the State Board of Education. This revised plan also was not approved.

"Under section 165.677, RSMo 1949 the County Board of Education is now proceeding to make a new plan which is to be submitted to the voters of the County within sixty days from the time the revised plan was rejected by the State Board of Education. Since we are now in the 1957-58 school year, and the statute provides that the Board use daily attendance data for the preceding year, there is some confusion among the Board members and the County Superintendent as to whether the 1955-56 data, which was used in the rejected plans submitted to the State Board of Education, should be used or whether the 1956-57 attendance data, which would be the data for the preceding year, should be used.

"An opinion concerning the foregoing question will be greatly appreciated by the County Board of Education and by this office."

The particular portion of Section 165.677, RS, Cum. Supp. 1955, which gives rise to this question is that which reads:

"No enlarged district may be proposed or submitted without the approval of the state board unless such proposed district shall have a minimum of two hundred pupils in average daily attendance for the preceding year or is comprised of at least one hundred square miles of area."

In arriving at the meaning of this provision, we are guided by the quotation contained in Willard Reorganized School Dist. No. 2 of Greene County v. Springfield Reorganized School Dist. No. 12 of Greene County, 241 Mo. App. 934, 248 SW2d 435, 442:

" * * * We may not capriciously ignore the plain language of the statute but in determining what the language really means we may consider the entire purpose and

Honorable Dick B. Dale, Jr.

policy of the statute and "the language in the totality of the enactment" and construe it in the light of "what is below the surface of the words and yet fairly a part of them." The meaning of statutes and particularly the meaning of our school statutes may not be found in a single sentence but in all their parts and their relation to the end in view or to the general purpose. * * *"

The purpose of this entire enactment was succinctly stated in State ex rel. Rogersville Reorganized School Dist. No. 4, of Webster County, v. Holmes, 363 Mo. 760, 762, 253 SW2d 402:

"The reorganization law became effective July 18, 1948. Its purpose was to promote the rapid merger of the multitude of small, inadequately equipped and financed school districts of this State into fewer and larger districts with financial resources to provide adequate buildings, teaching staffs and equipment. * * *"

Judging from the portion of Section 165.677 quoted above, it evidently was the opinion of the Legislature that generally the minimum size of a school district, in order to effect the purpose of the act, should be one hundred square miles in area or consist of two hundred pupils in average daily attendance. We say "generally" because it was also apparently recognized that there might be circumstances in which a smaller district would be acceptable, in which event it could be approved by the State Board of Education. In any event, there is a prohibition against the creation of a smaller district without the approval of the State Board.

Although for the purpose of jurisdiction the submission of its own plan to the voters of the proposed district by the county board of education may be considered as just one more step in the total process of reorganization (State ex rel. Corder School Dist. No. R-3 v. Oetting, Mo. App., 245 SW2d 157), we do not believe that would justify the use of the attendance figures for the school year 1955-1956 in determining the size of the proposed district which is to be submitted to the voters, even though those were the latest figures at the time the two rejected plans were being considered by the State Board of Education.

Honorable Dick B. Dale, Jr.

Now at this point when the county board is submitting its own plan to the voters, which is the first time that the minimum size for proposed districts comes into operation, there are attendance figures available for the school year 1956-1957. Considering the purpose and policy of the statute, i.e., the creation of districts of adequate size, and the language in the totality of the reorganization law, we are of the opinion that the words "preceding year" as used in the portion of Section 165.677, quoted above, and as applicable to your situation, mean the school year beginning July 1, 1956 and ending June 30, 1957 (\$163.020, RSMo 1949).

CONCLUSION

It is the opinion of this office that the data on average daily attendance for the school year 1956-1957 must be used in determining the average daily attendance of a proposed enlarged school district being submitted to the voters as the plan of the county board of education, unapproved by the State Board of Education, when such plan is submitted to the voters after June 30, 1957 and before July 1, 1958.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

LINCOLN UNIVERSITY: Sec. 172.300, RSMo, Cum. Supp. 1955,
TEACHERS' RETIREMENT does apply to curators of Lincoln
SYSTEM : University with respect to the use
of state appropriated funds for
retirement, disability and death plans.



December 10, 1957

Honorable Earl E. Dawson
President
Lincoln University
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Vernon's Annotated Missouri Statutes
lists the following revision of Section
172.300 of the Missouri Statutes:

"Section 172.300 (1955 Supp.)

"The curators may appoint and remove, at discretion, the president, deans, professors, instructors and other employees of the university; define and assign their powers and duties, and fix their compensation, and such compensation may include payments under, or provision for, such retirement, disability, or death plan or plans as the curators deem proper for persons employed by the university and paid out of any of its public funds for educational services, their beneficiaries or estates, and the curators may administer such plan or plans under such rules and regulations as they deem proper; and for these purposes the curators may use state-appropriated or other public funds under their control and pay or transfer such funds into a fund or funds for paying such benefits, and they may enter into agreements for and make contributions to both voluntary and statutory plans for paying such benefits.'

"The Board of Curators of Lincoln University would be most pleased to have the written opinion of your office as to whether

Honorable Earl E. Dawson

the revision with respect to the use of state-appropriated funds for retirement, disability and death plans applies to the Curators of Lincoln University."

In regard to the above, we direct your attention to Section 175.040, RSMo 1949, which reads:

"Board to organize and have same powers as curators of state University of Missouri.- It is hereby provided that the board of curators of the Lincoln University shall organize after the manner of the board of curators of the state University of Missouri; and it is further provided, that the powers, authority, responsibilities, privileges, immunities, liabilities and compensation of the board of curators of the Lincoln University shall be the same as those prescribed by statute for the board of curators of the state University of Missouri, except as stated in this chapter."

The situation with which we are confronted here is that Section 175.040, RSMo 1949, applied to and adopted Section 172.300, RSMo 1949. In 1955, Section 172.300, supra, was amended. The question is whether Section 175.040 applies to the amended section as it did apply to the section before its amendment. In other words, when a reference statute is amended, does it continue to be applicable to the statute to which it referred. We may here point out that Section 172.300, as amended, contains the same material that was found in the section prior to its amendment, plus additional material.

In this respect, we direct attention to Vol. 82, C.J.S., p. 846, et seq., which reads:

"Construction with statute adopted by reference in general. Where a statute adopts a part or all of another statute by a specific and descriptive reference thereto, as it may do in accordance with the rules stated supra §§ 70-72, the effect is the same as if the statute or part thereof adopted had been written into the adopting statute. Where, however, the adopted statute is referred to merely by

words describing its general character, only those parts of it which are of a general nature, or particularly relate to the subject of the adopting statute, will be considered as incorporated into the later.

"Where one statute adopts such provisions of another 'as are applicable,' the court, in determining what provisions are applicable, must construe into the adopting statute only such provisions of the prior act as will give force and effect to the later act; and, when the subsequent legislation incorporates pre-existing laws 'insofar as same is applicable,' the quoted expression controls in determining the force or application of such adopted laws in a particular situation. When the legislature, in adopting the procedural provisions of another act, made substitution in certain instances, it will be inferred that, on matters not specified, no substitution was intended.

"In dealing with cases of legislation by reference, the primary consideration to be kept in view is the general scope and object of the amending legislation; and, in determining whether a reference adopted or included a particular clause of the first act, neither statute should be subject to a strained construction.

"Effect of modification of adopted statute.
The question whether one statute absorbing or incorporating by proper reference provisions of another will be affected by amendments made to the latter is one of legislative intent and purpose. As a rule the adoption of a statute by reference is construed as an adoption of the law as it existed at the time the adopting statute was passed, and, therefore, is not affected by any subsequent modification of the statute adopted unless an intention to the contrary is clearly manifested; but, where the legislative intent to do so clearly appears, the adopting statute will include subsequent modifications of the original act.

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"A well-established exception to, or qualification of, the general rule exists where the reference in an adopting statute is to the law generally which governs the particular subject, and not to any specific statute or part thereof; in such case the reference will be held to include the law as it stands at the time it is sought to be applied, with all the changes made from time to time, at least as far as the changes are consistent with the purpose of the adopting statute.

"Where a statute limits its provisions by reference to a section of the code of civil procedure which is further limited by a subsequent section of such code, both sections relating to a common subject, one being a complement of the other, and both having always been regarded as one, the statute is not limited merely by the section specifically referred to, but also by the other. So it has been held that, where one section or provision of a statute adopts and incorporates by reference the provisions of another section or subdivision of the same statute, a subsequent amendment of the latter will be regarded as affecting the entire statute, including the subdivision which made the adoption."

We also direct attention to the case of *Johnson v. Laffoon*, 77 S.W. 2d 345, a case decided by the Court of Appeals of Kentucky, which case, at l.c. 347, reads:

"Now it is true that, when a statute adopts a part or all of another statute by a specific and descriptive reference thereto, the adoption takes the statute as it exists at that time. The subsequent amendment or repeal of adopted statute has no effect on the adopting statute, unless it is also repealed expressly or by necessary implication. *Burns v. Kelley*, 221 Ky. 385, 298 S.W. 987. But this rule has application only to where the adoption is by a specific and descriptive reference. Where the reference is not to any particular statute or part of a statute, but to the

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law generally which governs a particular subject, the reference in such case means the law as it exists at the time the exigency arises to which the law is to be applied. *Cole v. Wayne Circuit Judge*, 106 Mich. 692, 64 N.W. 741. * * *

We next direct attention to the case of *Turner v. Missouri-Kansas-Texas R. Co.*, 142 S.W. 2d 455, a case decided by the Supreme Court of Missouri, which case, at l.c. 458, reads:

"We are unable to accept this view. The title of the bill when Sec. 869 was first enacted discloses a contrary legislative intent. It read: 'An Act to amend chapter 103 of the Revised Statutes of Missouri of 1889, entitled "Limitations of actions," by adding a new section thereto.' (Chapter 103 then covered the same subject matter as Arts. 8 and 9 now.) The whole chapter was amended by the addition of the section, and the rule is that for the purposes of construction the amendment is to be considered a part of the original act as if it had always been contained therein. 59 C.J. § 647, p. 1096; 25 R.C.L. § 159, p. 907. Further, the chapter dealt generally with limitations governing real and personal actions; and another rule of construction is that when a statute (like Sec. 874) refers not merely to a particular statute, but to the law generally governing a certain subject, the reference includes not only the law in force when the referring statute was enacted but also subsequent laws on that subject, so far as consistent with the statute. 25 R.C.L. § 160, p. 908, 59 C.J. § 624, p. 1061."

We also direct attention to the case of *State v. McHarness*, 255 S.W. 2d 826, which, at l.c. 827, et seq., reads:

"The instant case was tried March 3, 1952, by a jury selected from a panel of veniremen drawn from a list of persons qualified for jury service, the list having been compiled in accordance with Section 497.130 RSMo 1949, V.A.M.S. The Section 497.130 (and Section 497.010) originally a part of the Act of 1947 applicable to juries in

Jackson County, Vol. 1, Laws of Missouri 1947, pp. 342-350, was repealed, and a new Section 497.130 (and a new Section 497.010) enacted, effective October 9, 1951. Laws of Missouri 1951, pp. 562-563. The repeal and re-enactment of Section 497.130 (and Section 497.010) were in effect an amendment of the Act of 1947. Defendant-appellant filed her motion to quash the panel or to challenge the array on the stated grounds that the panel of veniremen was drawn and selected from a list compiled under the old, now repealed and non-existing statute, and that, consequently, the panel, from which the trial jury in the instant case was selected, was illegal.

"The new Section 497.130 provides that, after it is ascertained that a county contains the prescribed number of inhabitants (see the new Section 497.010), the Board of Jury Supervisors shall cause a complete list to be made 'immediately.' However, the evidence shows that, from a practical standpoint, the list such as required under the new Section 497.130 cannot be compiled without laborious and painstaking examinations of the assessor's books and the list of registered voters, and the further investigation as to qualifications of the persons to be included in the compilation. Surely the Legislature never contemplated such a list could be made available for use 'immediately' upon the effective date of the amendment. According to the evidence introduced upon the hearing of the motion to quash, the Jury Commissioner of Jackson County under the supervision of the Board of Jury Supervisors, even before but in contemplation of the possible repeal of the old and the enactment of the new Section 497.130 in 1951, had been, and was at the time of the hearing, engaged in compiling a list of persons qualified under the provisions of the new Section 497.130. This labor had been diligently pursued, when possible, but had not been completed at the time of the hearing of the motion to quash and the trial of the instant case.

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"Referring to the unrepealed Section 497.140, subd. 2, RSMo 1949, V.A.M.S., it will be observed the Legislature contemplated that time is required to complete the compilation of a new list of qualified jurors, and so the Legislature in the Act of 1947 provided that the list in effect at the time of the enactment of the Act of 1947 should be continued in use until a list could be made ready for use under the then new, but now repealed, Section 497.130. Inasmuch as the new Section 497.130, enacted in 1951, is a re-enactment of a part of the Act of 1947 (now Chapter 497, RSMo 1949, V.A.M.S.) applicable to juries in Jackson County, and the Section 497.140, supra, of the Act of 1947 was not amended or repealed, we are of the opinion it was intended that Section 497.140 should become applicable to the new Section 497.130 enacted in 1951. Otherwise stated, in ruling the instant assignment of error, we are of the opinion the amendment should be considered as a part of the original act as if it had always been contained therein. *Turner v. Missouri-Kansas-Texas R. Co.*, 346 Mo. 28, 142 S.W. 2d 455, 129 A.L.R. 829; 59 C.J., § 647, pp. 1096-1097."

Further, attention is directed to the case of *Pogue v. Swink*, 261 S.W. 2d 40, where, at l.c. 43, the Missouri Supreme Court stated:

"Another principle of law also applies; that is: The rule that where a later act covers the entire subject of a prior act or acts, manifesting a legislative intent that the later act prescribes the law with respect to the subject matter, the later act supersedes the earlier act or acts. * * *"

From the above, it appears to be clear that where the adopting statute (§174.040) adopts in general terms all portion of another statute (§172.300) and not specific parts, that the amended statute is to be regarded as being adopted as well as the statute before its amendment. An examination of Section 174.040 shows it to be that type of statute. It provides that the board of Lincoln University shall "have same powers" as the board of curators of the University of Missouri. Also, that the "powers, authority,

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responsibilities, privileges, immunities, liabilities and compensation of the board of curators of the Lincoln University shall be the same as those prescribed by statute for the board of curators of the State University of Missouri * * *." From the above, it would appear to be plain that it was the intent of the framers of Section 175.040 that the board of curators of Lincoln University should be in precisely the same situation as the board of curators of Missouri University. It could hardly be believed that the framers of the above section did not contemplate that the situation of the board of curators of the University of Missouri, with respect to powers and authority, would not be changed from time to time. It seems clear that the intention of the Legislature was that whatever changes might be made with respect to the powers and authority of the curators of the University of Missouri, that the same changes as to powers and authority would automatically extend to the curators of the Lincoln University.

CONCLUSION

It is the opinion of this department that Section 172.300, RSMo, 1955 Cum. Supp., does apply to the curators of Lincoln University with respect to the use of state appropriated funds for retirement, disability and death plans.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:hw;ml

WATERS:
STATE:
STATE PARK
BOARD:

Authority to construct fences across artificial lake
covering state-owned land.



January 17, 1957

Honorable Richard J. DeCoster
Representative, 69th General Assembly
Capitol Building
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion, which request reads:

"The Missouri State Park Board has under consideration the acceptance of a tract of land located in Lewis County and now owned by the State Highway Department for development into a State Park. This tract contains some eighty to one hundred acres water area. These lakes were formed as a result of the excavation of gravel and sand deposits in this area. A portion of one of the lakes, about four or five acres belongs to a private individual. Negotiations for acquiring this private property have been unsuccessful so far.

"In the event that they are not able, or do not deem it feasible, to take title to this private water area, the Park Board has under consideration the possibility of building a fence along the 'property line' between the portion of water now owned by the state and the portion privately owned.

"This lake is filled primarily by table water, there being very little run-off into it. It is located in what was perfectly level farm land. The particular lake in question is horseshoe-shaped, some two miles in length and has an average depth of around fifteen to twenty feet.

Honorable Richard J. DeCoster

"Your opinion is respectfully requested as to whether or not the State Park Board, if it undertook the development of a State Park here, could, after accepting title from the Highway Department, legally build a fence separating the privately owned water area from the part owned by the State."

This body of water or so-called lake is in the nature of an artificial lake, it is not caused from overflow water of any stream or river and neither does it have any direct outlet to any such body of water. It was caused by the removal of gravel and sand deposits from an almost level tract of farm land, thereby leaving large openings in said land which were primarily filled by so-called table water.

It is our understanding that the State Highway Commission presently holds title to most of the land covered by this body of water. However, one individual does own possibly some four or five acres of a portion of said water. Furthermore, no easement or agreement of any kind has been heretofore executed by the respective owners thereof, as to the use of said water. It is quite possible that the individual owner of a small portion of land underlying said water has in the past used said water for certain recreational purposes. The boundary of said land underlying said body of water owned by the state is described by metes and bounds and can definitely be located.

Under such facts and circumstances we can see no reason why the state, either the Missouri Highway Commission or the Missouri State Park Board, if it ultimately becomes the owner of said land, cannot construct a fence on its side of the property line or a division fence if the parties can agree thereto.

The state should at least have the same right to construct fences as an individual if for no other reason than the protection of its property. Chapter 272, MoRS 1949, authorizes the construction of fences.

This request does not involve navigable and nonnavigable rivers, commerce, etc., therefore, all of the many decisions referring to same are not pertinent here. Neither can said individual owner raise the question of adverse possession, prescription, etc., against the state, as under Section 516.090, MoRS 1949, such limitations do not apply against any land belonging to the State of Missouri. Said section reads:

"Nothing contained in any statute of limitation shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable

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use, or to any lands belonging to this state."

Volume 93, C.J.S., Section 163, page 893, in part, reads:

"No such right it has been held, can be acquired against a public right in a stream or other water, nor can it be acquired as against the United States or a state, * * * * *"

See Bowzer v. State Highway Commission, 170 S.W. 2d. 399, l.c. 403, and Hecker v. Bleish, 3 S.W. 2d. 1008.

The construction of a fence will in no manner diminish or increase the water supply covering this individual's land. Furthermore, both the state and individual owner will still have the normal use of water over their respective lands. A fence will only prevent trespass on and over water flowing over their respective lands.

It was held in Smoulter et al., v. Boyd, 58 Atl. Rep. 145, l.c. 145, 146 and 147, that such a fence could be erected across the surface of a lake, in so holding the court said:

"* * * * *In 1895, Mr. Boyd built a boom of heavy logs fastened together at the ends by iron links, and thereon erected a barbed wire fence across the surface of the lake. This boom begins at the shore near the eastern corner of Mrs. Wormser's land and follows the line between her land and Mr. Boyd's land in a northerly course to the opposite shore, thereby, whilst not practically interfering with the flow of water, effectually and permanently excluding plaintiffs and all others from crossing to or from the eastern part of the lake.' * * * * *

* * * * *

"It is contended by the plaintiffs, however, that, even if Mrs. Wormser's title be limited by the metes and bounds set forth in her deed, the fact that she owns a small portion of the bed of the lake gives them the right to use the waters of the entire lake for boating purposes. But with this contention we do not agree. The ownership in fee of the soil covered by the waters of Lilly Lake out side of Mrs. Wormser's lines being in the defendant, we think he has the right to control that part of the waters of the lake above his land to the extent, at least, of prohibiting the use of the

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waters by Mrs. Wormser or her grantees for boating purposes. His grant of the land in the bed of the lake gave him title ad coelum et ad inferos, and hence the waters on his land were subject to his use and enjoyment. There were no rights of a riparian owner which made those waters subject to an easement in favor of the plaintiffs while they covered the defendant's land. The grant to the plaintiffs of a part of the bed of the lake, as observed above, is clearly and distinctly defined by their deed, and does not extend to the other part of the bed of the lake owned in fee by the defendant. When, therefore they entered on the waters covering the defendant's land with their boats for pleasure and recreation, they became trespassers. This logically results from the character of the title of the parties to the bed of the lake vested in them by their respective conveyances. Each of the parties owns his land in fee, and included in that ownership is the right to the use of the water while it is on the land. Any use of it for boating purposes by another is an infringement of the rights of property vested in the owner of the land. It follows from what has been said that the defendant had the right to erect the boom on his premises for the purpose of preventing the plaintiffs from boating or sailing on the waters covering his land, and that the trial judge was in error in requiring it to be removed."

CONCLUSION

Therefore, it is the opinion of this department under the foregoing facts and circumstances, should the Missouri State Park Board acquire title to the land now held in the name of the Missouri State Highway Commission, it would be authorized to construct a fence across said body of water located along its property line.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH:mw

COUNTY COURT:
COUNTIES:
COUNTY ASSESSOR:
ASSESSOR:

The county court of a county of the third class cannot withhold from the compensation due the assessor for performing his duties an amount equal to any overpayment for prior years. Further, the county court may, by appropriate action, recover back any overpayments previously made to the county assessor.



June 7, 1957

Honorable David Donnelly
Prosecuting Attorney
Laclede County
Lebanon, Missouri

Dear Mr. Donnelly:

Reference is made to your recent request for an official opinion, which request reads as follows:

"The County Court of this County has asked me to present the following situation to you for an official opinion.

"The Assessor of this County, on numerous occasions in the past, has made what we term double assessments pertaining particularly to personal property taxes. For example, the Assessor will many times assess personal property taxes against Mary Jones and also against Mrs. John Jones who is the same person. Sometimes this double assessment is caught by the County Collector of Revenue before he makes his monthly assessment with the County Court, but frequently this can not be done until after his monthly settlement and, therefore, the Assessor feels he is entitled to his commission on both assessments.

"The Assessor will turn his books in to the County Court on June 1, 1957, and will expect his commission to be paid on that date. Therefore, is the County Court authorized to deduct erroneous double assessments for the year 1956, made by the Assessor, from his 1957 commissions? Also, since this Assessor will not succeed himself in office, can the County Court later recover from him commissions paid to him from his 1957 assessment which may later be found to be double assessments?

Honorable David Donnelly

"If at all possible, the County Court would appreciate having your opinion prior to June 1, 1957, the date on which the Assessor will expect his commission to be paid."

We note that your county is a county of the third class, and refer to Sec. 53.130, RSMo Cum. Supp. 1955, relating to the compensation of the assessor in counties of said class. This section provides as follows:

"The compensation of the county assessor in counties of the third class shall be sixty cents per list, and each county assessor shall be allowed a fee of six cents per entry for making real estate and tangible personal assessment books, all the real estate and tangible personal property assessed to one person or to husband and wife to be counted as one name, one half of which shall be paid out of the county treasury and the other one half out of the state treasury. The assessor in counties of the third class shall place the street address or rural route and post office address opposite the name of each taxpayer on the tangible personal property assessment book; provided, that nothing contained in this section shall be so construed as to allow any pay per name for the names set opposite each tract of land assessed in the numerical list."

Suffice it to say it is not the duty of the assessor to cause to be made more than one listing of personal property subject to taxation and owned by the same person, nor do we find any warrant or authority for the assessor to make more than one entry of the same property owned by the same person in the "assessor's book." Section 137.210, RSMo 1949.

Section 53.130, supra, is designed to compensate the assessor for the duties he is required by law to perform. It is, of course, a fundamental rule of statutory construction that the right to compensation for the discharge of official duties is purely a creature of statute, and an officer can recover no other or further compensation, nor by a different mode than that provided by statute. Ward v. Christian County, 341 Mo. 1115, 111 SW2d 182; King v. Riverland Levee Dist. 218 Mo. App. 490, 279 SW 195; Nodaway County v. Kidder, 344 Mo. 795, 129 SW2d 857; Holman v. City of Macon, 155 Mo. App. 398, 137 SW 16.

Honorable David Donnelly

We do not find any other statute relating to the compensation of the assessor, and more particularly any statute which authorizes compensation to the assessor for taking more than one list or making more than one entry of taxable property belonging to the same person.

You first inquire whether the county court can withhold from the compensation due the assessor for performing his duties for the year of 1957 an amount equal to any overpayment to said assessor for prior years. Section 53.130, supra, allows the assessor compensation for duties performed annually. We find no authority by which the county court can withhold from compensation rightfully earned in any one year amounts equal to any overpayment for prior years, and, therefore, are of the opinion that such may not be done. What may or may not have been done in prior years in nowise affects the assessor's right to compensation for the current year.

Secondly, you inquire as to whether the county court can otherwise recover back compensation paid to the assessor without warrant of law. The Supreme Court has recognized the right of a county to recover money paid to an officer to which he is not entitled by law. In the case of Nodaway County v. Kidder, 344 Mo. 795, 129 SW2d 857, the court stated:

"* * * When a public official wrongfully receives public funds, although paid to him under an honest mistake of law, he must restore such funds. Lamar Township v. City of Lamar, 261 Mo. 171, 187, 169 S.W. 12; State ex rel. Barker v. Scott, 270 Mo. 146, 153, 192 S.W. 90; State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 536; State ex rel. Jarvis v. Dearing, Mo. App., 274 S.W. 477; Atchison County v. DeArmond, 60 Mo. 19.

"The rule is stated in 15 C.J. 509, Sec. 176, as follows: 'Money paid to a county officer to which he is not entitled by law may be recovered back, without previous demand, in an action for money had and received instituted by the county.'

"The rule is also stated as follows: As a general rule any compensation paid to a public official by the state or other governmental body not authorized by law, or in excess of the compensation authorized by law, may be recovered by the proper governmental body * * *. 46 C.J. 1030, Sec. 285."

Honorable David Donnelly

In regard to this question I am enclosing herewith a copy of an opinion to Sam Appleby, Prosecuting Attorney of Christian County, issued under date of March 23rd, and holding that the county may recover any overpayment that has been made by it through the county court to the assessor.

It is no defense to an action to recover money paid to a county officer that the account between the officer had been adjusted or settled, or that the money was voluntarily paid. 20 C.J.S., Counties, Sec. 128, pp. 939-940.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that the county court of a county of the third class cannot withhold from the compensation due the assessor for performing his duties an amount equal to any overpayment for prior years.

It is the further opinion of this office that the county court may by appropriate action recover back any overpayments previously made to the county assessor.

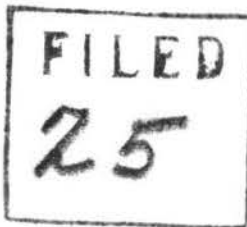
The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:ld:gm

OCCUPATIONAL DISEASES: It is not the intent of Section 292.300, RSMo
MUNICIPALITIES: 1949, to require municipal governments who
FIRE DEPARTMENTS: operate and maintain fire departments that em-
ployees in that department come within its pro-
visions.



August 5, 1957

Honorable L. L. Duncan
Director
Division of Industrial Inspection
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"On numerous occasions this department has been called upon to interpret the above mentioned section as it would or would not relate to municipal governments.

"Is it the intent of this section to require municipal governments who operate and maintain fire departments to provide fire fighters with the necessary equipment to protect them from contracting an illness or disease? I have in mind equipment such as respirators, gas masks and other safety devices.

"In the above mentioned section would the municipality be required to furnish free of charge the necessary equipment for the prevention of illness, disease, or injury. It is my understanding that firemen are required to supply the equipment."

All references to statutes are to Revised Statutes of Missouri, 1949.

The occupational disease statute is Section 292.300, which reads:

"That every employer of labor in this state engaged in carrying on any work, trade or process which may produce any illness or disease peculiar to the work or process carried on, or which subjects the employee to the danger of illness or disease incident to such work, trade or process, to which employees are exposed,

Honorable L. L. Duncan

shall for the protection of all employees engaged in such work, trade or process, adopt and provide approved and effective devices, means or methods for the prevention of such industrial or occupational diseases as are incident to such work, trade or process."

The section to which you allude is Section 292.320, which reads:

Every employer in this state to which sections 292.300 to 292.440 applies shall provide for and place at the disposal of the employees so engaged, and shall maintain in good condition without cost to the employees, working clothes to be kept and used exclusively by such employees while at work and all employees therein shall be required at all times while they are at work to use and wear such clothing; and in all processes of manufacture or labor referred to in this section which are productive of noxious or poisonous dusts, adequate and approved respirators shall be furnished and maintained by the employer in good condition and without cost to the employees, and such employees shall use such respirators at all times while engaged in any work productive of noxious or poisonous dusts."

We would first note that a municipal corporation functions in two capacities, i.e., a proprietary or private corporate, and a governmental.

In Yokley on Municipal Corporations, page 110, Section 56, we note the following in regard to the private corporate activities of a municipality:

"The private duties of a municipality are said to be those which are municipal or corporate duties as distinguished from governmental duties. A governmental entity, functioning in a proprietary capacity, should be permitted to perform such function in a manner as efficiently as would a private person.

"It is a well established principle that a municipal corporation owning and operating a water system and selling water to individuals, although engaged in a public service, does so in its business or proprietary capacity, and not in any governmental capacity, and no distinction is to be drawn between such business

Honorable L. L. Duncan

whether engaged in by a municipality or by a private corporation.

"A municipality, in operating and constructing an electric plant, functions as a private or business corporation."

In regard to the governmental functions of a municipality, we note Section 55, page 109, of the same work, which reads:

"In its public or governmental capacity, the municipality partakes of the sovereignty of the state. It acts as a kind of arm of the state, and as such it exercises the limited governmental powers granted to it by the state. Among typical governmental functions of a municipality may be mentioned: the levy of property authorized taxes, the assessment and collection of its proportion of the state tax, police regulations, suppression of crime, protection of the public health, the exercise of eminent domain, the operation of a fire department and the administration of justice."

We call particular attention to the case of Lockhart v. Kansas City, 175 S.W. 2d 814. In this case, the City employed in its water purification plant a person who contracted an occupational disease by reason of inhaling excessive quantities of poison dust. The court held that this man was employed by the city in its private corporate capacity, and that therefore, he came within the occupational disease statute.

The strong implication of the case was that if this employee had been functioning in a governmental capacity that the occupational disease statute would not have applied. At l.c. 817, the court stated:

"The view that a municipality's business operations, in its private corporate capacity, does come under such employer's liability acts seems to be almost universally accepted. * * *."

At l.c. 819, the court stated:

"* * * We, therefore, hold that a municipality engaged in furnishing public utility services in its private corporate capacity is subject to the statutes relied on by plaintiff herein, and that plaintiff was entitled to instructions based on the standards therein provided. * * *."

Honorable L. L. Duncan

CONCLUSION

It is the opinion of this department that the provisions of Section 292.300, RSMo 1949, requiring protective devices against occupational diseases are not operative as to a municipal government's operation and maintenance of a fire department.

The foregoing opinion, which is hereby approved, was prepared by Assistant Attorney General Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

By

Robert R. Welborn
Assistant Attorney General

HPW/bi

SCHOOLS: If chairman of board of education employed by
SCHOOL DISTRICTS: transportation company which furnishes school
OFFICERS: transportation to his district has direct or
CONTRACTS: indirect pecuniary interest in transportation
contract, such contract is void as against
public policy.



January 9, 1957

Honorable James W. Farley
Member, House of Representatives
Platte County
Farley, Missouri

Dear Mr. Farley:

This is in response to your request for opinion dated
November 28, 1956, which reads, in part, as follows:

"I have had a request for a ruling from
your office concerning a situation that has
arisen in one of our Platte County School
Districts. The facts are as follows:

The School District in question con-
tracts with a transportation company for
said company to furnish bus transportation
to the pupils of a district. One of the
bus drivers employed by the transportation
company is also president of the School
Board. Section 165.360 of the Statutes
prohibits any member of such a School Board
from holding any office or employment of
profit from said Board while a member.
The point that we wish to have ruled upon
is whether the president of the School
Board is violating the Statute by accepting
employment from the transportation company.
The checks used to pay the bus drivers come
directly from the company and the School
Board only contracts with the company. I
might also add that the largest town in the
School District in question is a city of
approximately 1100 persons.

"One other point that has also arisen in
the same district is whether or not a School
Board member who runs an oil business can

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contract with or sell oil to the School District without violating the above Statute."

We are enclosing herewith copies of the following opinions which provide the answer to your second question and furnish the principle upon which the first is based:

Honorable Fred C. Bollow, June 30, 1948;
Honorable Homer L. Swenson, July 17, 1950;
Honorable James T. Riley, May 15, 1953.

These opinions hold that it is against the public policy of the state for a member of a board of education in his private capacity to contract with the board of which he is a member. This is a flat prohibition. However, with regard to the situation first presented in your request, where the board member is not the contracting party but merely a driver for the contracting transportation company, it becomes a question of whether the board member has a direct or indirect interest in the contract, i.e., whether he stands to benefit from it personally.

It has been said by courts in other jurisdictions that no definite rule can be given indicating the line of demarcation between that which is proper and that which is unlawful. For example, in *Tuscan v. Smith*, 130 Me. 36, 153 A. 289, 73 A.L.R. 1344, 1352, the town board had entered into a lease agreement with the brother of the chairman of the board. The chairman's brother was heavily indebted to him and the chairman had taken an active part in the entire business transaction. The court conceded that mere indebtedness did not necessarily create such an interest as would make the contract illegal but in this case the indebtedness, together with the activity of the chairman in the matter, his confidence and business relations with his brother and the other circumstances which discouraged bidding, indicated such an interest in the chairman as to void the contract. The court said, A. l.c. 294:

"It is unnecessary to discourse on the duties of public officials. Their obligations as trustees for the public are established as a part of the common law, fixed by the habits and customs of the people. Contracts made in violation of those duties are against public policy, are unenforceable, and will be canceled by a court of equity. No definite rule

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can be given indicating the line of demarcation between that which is proper and that which is unlawful. In the words of this court in the case of *Lesieur v. Inhabitants of Rumford*, 113 Me. 317, 321, 93 A. 838, 840, the question really is whether the town officer by reason of his interest is placed 'in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized and required him to act in the premises as an official.' See as authority for the same general principle, the following: *Bay v. Davidson*, 133 Iowa, 688, 111 N.W. 25, 9 L.R.A. (N.S.) 1014, 119 Am. St. Rep. 650; *Dillon: Municipal Corporations* (5 Ed.) § 772, 773; *Lesieur v. Inhabitants of Rumford*, supra."

In *Commonwealth ex rel. Gardner v. Elliott*, 291 Penn. 98, 139 A. 626, a city councilman was the brother of a painting contractor who had a contract with the city. The councilman was employed by his brother to do certain work under the contract. No emphasis was laid on the fact of relationship except that it was noted that transactions between brothers would naturally be special ones without formal contract or arrangement. It was held, however, that the councilman had such an interest as would warrant his ouster from office. The court said, A. 1.c. 627:

" * * * He assumed and appropriated to himself such an interest - a pecuniary interest - in the contract by accepting and performing labor, for pay, under it, thus receiving, while a borough officer, benefits arising from a contract for work to be paid for out of the public funds. The pecuniary remuneration for labor so performed constituted the forbidden 'interest' in that contract from which, as a borough officer, he profited. This is precisely what the law prohibits and which was enacted to protect the people from the frauds of their servants and agents. The record in this case discloses no fraudulent intent on the part of respondent; his participating in the performance of the contract was, however, a violation of the law, whether done innocently or not, and the assignments of error must be overruled."

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It is to be noted in this case also that the councilman was not just an employee but was making money under this particular contract.

In *Gillen v. City of Milwaukee*, 174 Wis. 362, 183 NW 679, the public official was a superintendent for the contracting corporation drawing a salary of \$4,500 per year as such. In holding that because of the interest of the official the corporation was not a competent bidder, the court said, NW 1.c. 682:

" * * * actual loss to the public is not the principle on which the law proceeds in condemning transactions of this kind. The law seeks to avoid situations where public officers are tempted to sacrifice the interests of the public to their own, which destroy faithfulness and fidelity in public service.

" * * * But we find very little authority on the exact question here involved; that is, whether contracts with a municipality made between a corporation having a salaried manager or employe who is also an officer of the city or board are valid. We do not hold that under all circumstances a contract between a municipality and a corporation having an employe who is also a public officer of the municipality would be invalid. The compensation of the employe might be so slight or his employment so transient that there would arise no conflict of interest. We do hold that under the facts proven in this case the commission and the trial court were justified in deciding that the *Gillen Company* was not a competent bidder."

Regardless of the type of case, i.e., whether it involves a debtor-creditor relationship, an officer or stockholder of a corporation, a member of a partnership, or an employee, the ultimate question to be determined is whether the officer by reason of his interest is placed in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized him to act in the premises as an official. For further discussion of this problem generally, see 43 Am. Jur., Public Officers, Sections 296-302, pages 105-109; 47 Am. Jur., Schools, Section 49, pages 329-331; 73 A.L.R. 1344; 74 A.L.R. 790.

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The question of interest is one of fact to be determined in each case. Wayman v. Cherokee, 204 Ia. 675, 215 NW 655. From the opinion request, we are unable to make this determination but merely furnish these guiding principles in order to aid those who in the first instance must make this determination.

We are inclined to agree with the Wisconsin court that employment alone would not be a sufficient interest to invalidate the contract. However, other factors should be considered and weighed, such as the nature of the employment, the relation of the board member to the governing officers of the employing company, whether the board member will make money under this particular contract, how much he is paid, whether his job depends upon the award of the contract to his employer, etc.

In short, if the facts indicate that the board member has a direct or indirect pecuniary interest in this contract, it is void as against public policy.

CONCLUSION

It is the opinion of this office that the mere employment of the chairman of the board of education of a school district by a transportation company which contracts with the district to furnish school transportation does not in and of itself invalidate the contract, but if the chairman of the board has a direct or indirect pecuniary interest in the contract, which is to be determined by considering his employment along with other factors present in each given case, the contract is void as against the public policy of the state.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

Encs (3)

JWI:ml

CRIMINAL LAW:
REPEAL OF RSMO 1949
CRIMINAL STATUTES:
HABITUAL CRIMINAL STATUTES:
SENATE BILL NO. 27
68th GENERAL ASSEMBLY:

Charges under subsection 3 o. tion
560.161, RSMo Supp. 1955, relating to
stealing by persons with prior convic-
tions, cannot be based upon prior con-
victions obtained under statutory
provisions which were repealed by the
bill which enacted Section 560.161.



January 28, 1957

Honorable Edward W. Garnholz
Prosecuting Attorney
St. Louis County
Clayton 5, Missouri

Dear Sir:

This department is in receipt of your request for a legal opinion, reading as follows:

"It would be greatly appreciated if you would advise this office when R.S. Mo. 560.161 Sec. 3 (fourth offense) can be applied.

"May it be used if any of the three prior convictions were under a statute enacted and repealed by the enactment of this present law, or must all of the convictions have taken place subsequent to the enactment of this new law?"

The pertinent provisions of Section 560.161, RSMo Supp., 1955, read as follows:

"1. Any person convicted of stealing as provided in subsection 2 of section 560.156 shall be punished as follows:

(1) If the value of the property stolen is less than fifty dollars, unless otherwise provided herein, by a fine of not more than one thousand dollars or by imprisonment in the county jail for not more than one year or by both such fine and imprisonment;

(2) If the value of the property stolen is at least fifty dollars, by imprisonment in the penitentiary for not

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more than ten years nor less than two years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment.

* * * * *

"3. Every person who has been previously convicted of stealing or of larceny as defined in subsection (1) of subsection 1 of this section, three times, and who shall subsequently be convicted of stealing within the meaning of said section, shall be deemed guilty of a felony regardless of the value of the stolen property, and shall be punished as provided by subdivision (2) of subsection 1 of this section."

Subsections 1 and 2 of Section 560.156, RSMo Supp., 1955, read as follows:

"1. As used in sections 560.156 and 560.161, the following words shall mean:

(1) 'Property', everything of value whether real or personal, tangible or intangible, in possession or in action, and shall include but not be limited to the evidence of a debt actually executed but not delivered or issued as a valid instrument and all things defined as property in sections 556.070, 556.080 and 556.090, RSMo 1949;

(2) 'Steal', to appropriate by exercising dominion over property in a manner inconsistent with the rights of the owner, either by taking, obtaining, using, transferring, concealing or retaining possession of his property.

"2. It shall be unlawful for any person to intentionally steal the property of another, either without his consent or by means of deceit."

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Sections 560.161 and 560.156 were enacted as part of Senate Bill No. 27 of the 68th General Assembly (Laws 1955, p. 508) which became effective on August 29, 1955. This bill repealed the then existing statutory provisions relating to larceny, embezzlement, and certain other offenses against property; and the new legislation, dealing generally with the same subject matter, created a new offense, "stealing," to replace the offenses defined in the repealed provisions.

Subsection 3 of Section 560.161, quoted above, replaced Section 556.285, RSMo Supp., 1951 (Laws 1951, p. 455), which read as follows:

"Every person who shall have been convicted three times of larceny in any degree and who subsequently shall steal, take and carry away any goods, wares or merchandise or other personal property, regardless of the value thereof, shall be guilty of grand larceny and, upon conviction, shall be punished by imprisonment in the penitentiary not exceeding five years or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment."

In *State v. King*, Mo. Sup., 275 SW2d 310, the court held that a person could be convicted under Section 556.285 although the prior convictions for petit larceny alleged as a basis for applying Section 556.285 had occurred prior to the effective date of that section. The court's opinion read, in part, as follows:

"One does not violate Laws 1951, p. 455, unless he commits a larceny subsequent to its effective date. The statute applies to 'Every person who shall have been convicted three times of larceny in any degree and who subsequently' commits another larceny. It is similar in this respect to §556.280, our habitual criminal act. All are charged with knowledge of the provisions of the statute. The allegations of the prior convictions are not charges of distinct crimes but are merely to disclose facts bringing the new offense within the statute and for determining the criminality of the new offense. In ruling that prior convictions aggravating a new offense need not

occur subsequent to the effective date of the statute, the cases hold that prior convictions of crime constitute a reasonable basis for the classification of offenders with respect to the severity of the punishment to be imposed.
* * *

Under the principles of this decision, if subsection 3 of Section 560.161 in fact so provided, a person might be convicted under said subsection 3 on the basis of prior convictions obtained before the enactment of said section and under statutes which have been repealed.

In subsection 3 of Section 560.161, by mentioning prior convictions of larceny, the Legislature attempted to provide expressly for the use of certain convictions prior to the enactment of said section as basis for action under said subsection. In view of the simultaneous repeal of statutes making larceny, as such, a crime, the reference to larceny in said subsection 3 could have had no other purpose. However, for the reasons set forth below, it is believed that the Legislature failed in its purpose.

Section 560.161 was Section 5 of Senate Bill No. 27. As the bill was introduced and passed by the Senate, subsection 3 of Section 5 provided that prior convictions "of stealing or of larceny in any degree" should be a basis for convictions thereunder. By a House amendment, the quoted words were amended to read, "of stealing or of larceny as defined in Section 5, (1)," and the bill was enacted in this form (Laws, 1955, page 509). The Reviser of Statutes construed "Section 5, (1)," to mean subdivision (1) of subsection 1 of Section 5 (Section 560.161, RSMo Supp. 1955). This was not the only possible construction, but it was the most logical one and it will be accepted for the purposes of this opinion.

Subdivision (1) of subsection 1 of Section 560.161 does not define larceny or any other term. Instead, it states the penalty for stealing where the value of the property stolen is less than \$50.00. It might be argued that the language "larceny as defined in subdivision (1) of subsection 1 of this section," appearing in subsection 3 of Section 560.161, is intended to mean larceny as defined by prior statutes and involving property having a value of less than \$50.00. However, the fact remains that that larceny is not defined in said subdivision (1) and, following the rule of strict construction of criminal statutes (which is particularly applicable to highly penal habitual

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criminal statutes), it is believed that one cannot properly indulge in speculation concerning the intent of this ambiguous language and give effect thereto.

It should also be noted that, if the language in question should be given the meaning suggested in the third sentence of the preceding paragraph, the statute would produce an absurd result, which would be a basis for holding that there was unwarranted discrimination which would invalidate the statute as a denial of equal protection of the laws. Under such interpretation, a person who was convicted of stealing property having a value of less than \$50.00 and who had three prior convictions of larceny involving amounts less than \$50.00 would be subject to greater punishment than one who was convicted of a like offense and who had three prior convictions of larceny involving amounts of \$50.00 or more. There is no imaginable basis for such differentiation; and while legislatures have broad discretion in the matter of penalties for crimes and the courts seldom interfere and will not do so except in extreme cases, it is difficult to think of a more extreme case than this would be if the statute were so construed. See 83 A.L.R. 1362; 15 Am. Jur., Criminal Law, Sec. 507.

If subsection 3 of Section 560.161 mentioned only prior convictions of "stealing" it might be contended that convictions prior to the enactment thereof of offenses which would constitute "stealing" under the new statute could be used as a basis for convictions under said subsection. However, it is believed that the fact that the Legislature attempted to deal expressly with certain convictions under the old law (i.e., certain convictions of larceny) makes it clear that it was not the intent that convictions under the old law should be regarded as convictions of "stealing."

CONCLUSION

Upon the basis of the foregoing, it is the opinion of this office that charges under subsection 3 of Section 560.161, RSMo Supp., 1955, cannot be based upon prior convictions obtained under statutory provisions which were repealed by the bill which enacted Section 560.161.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Baumann.

Yours very truly,

JOHN M. DALTON
Attorney General

JCB:ml

WILDLIFE CODE:
CONSERVATION CODE:
RULES AND REGULATIONS:

Sale of wild rabbits in Missouri prohibited to everyone, resident or nonresident. Farmer in Illinois taking opossums on his farm cannot sell same or the products thereof in Missouri.



March 27, 1957

Honorable William J. Geekie
Prosecuting Attorney, City of St. Louis
Municipal Courts Building
St. Louis, Missouri

Attention: Mr. Sidney Faber, Assistant Prosecuting Attorney.

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"The agents of the Conservation Commission have requested prosecution in certain cases and before proceeding I would like your opinion based upon the following facts.

"1. A farmer from Illinois shoots rabbits and opossum on his own farm in Illinois and on week ends takes them to a farmer's market in St. Louis where he offers them for sale. The farmer does not have a permit under Sec. 45(J) of the Wildlife Code.

"Query: a. Is the farmer protected under the provisions of Sec. 39 of the Wildlife Code?

"b. Does the Code only apply to animals of Missouri or does it also protect animals taken legally or illegally in another state?

"2. Same facts as in Number One but a relative of the farmer does the shooting on the farmer's land and turns them over to the farmer who brought them to the farmer's market and offered them for sale.

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"Query: If the farmer has immunity, does the immunity extend to him in this case since he has not done the actual shooting?"

A well established rule of construction is that all pertinent rules and regulations and laws should be construed together and harmonized if possible. *Cairo Bridge Comm. vs. Mitchell*, 352 Mo. 1136, 181 S.W.2d. 496.

Section 252.020, MoRS 1949, defines commission, wildlife, and rules and regulations as used in said chapter, and reads:

"As used in this chapter, unless the context otherwise requires:

"(1) The word 'commission' shall mean and include the Conservation Commission as established by the Constitution of Missouri; and the words 'rules and regulations' shall mean those made by said Commission pursuant thereto;

* * * * *

"(3) The words 'wild life' shall mean and include all wild birds, mammals, fish and other aquatic and amphibious forms, and all other wild animals, regardless of classification, whether resident, migratory or imported, protected or unprotected, dead or alive; and shall extend to and include any and every part of any individual species of wild life."

Section 252.030, MoRS 1949, provides that ownership and title to wildlife is in the State of Missouri and reads:

"The ownership of and title to all wildlife of and within the state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the state of Missouri. Any person who fails to comply with or who violates this law or any such rules and regulations shall not acquire or enforce any title, ownership or possessory right in any such wild life; and any person who pursues, takes kills, possesses or disposes of any such wild life or attempts to do so, shall be deemed to consent that the title of said wild life shall be and remain in the state of Missouri, for the purpose of control, management, restoration, conservation and regulation thereof."

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Section 252.190, MoRS 1949, makes possession of wildlife contrary to provision of said chapter and rules and regulations of the Commission, unlawful, and any person having possession shall be deemed guilty of a misdemeanor.

Section 252.040, MoRS 1949, further provides that no wildlife shall be pursued, taken, killed, possessed or disposed of except in conformity with rules and regulations of said Commission.

Under Section 38 of the Wildlife Code of Missouri it permits the pursuit, taking, transportation, selling, possession only by a person having the prescribed permit to do so as allowed by said Code or who is specifically allowed by the Code to do so without a permit.

In reply to your first inquiry, the sale of rabbits is not permitted by anyone, resident or nonresident, and therefore it is illegal to sell such rabbits in the State of Missouri.

Under the Wildlife Code, rabbits are game animals and do not come within the definition of fur-bearing animals. Section 55 of the Code defines game animals in the following manner:

"The term 'game animals,' shall include the deer, bear, wild rabbit(which shall include all wild rabbits and hares), red, gray, black and fox, squirrel, and fur-bearing animals."

Fur-bearing animal is defined in the same section and reads:

"Mink, muskrat, opossum, otter skunk(polecat), spotted skunk(civet cat) beaver, racoon, badger, weasel(ermine) red fox and gray fox."

In this state the products of fur-bearing animals, which have been legally taken and preserved under certain conditions as provided under Section 49, Wildlife Code of Missouri, may be sold by the holder of a fur buyer's permit, or holder of a resident fur dealer's permit. Said section further provides that furs offered for sale by resident hunters, trappers and fur buyers, after a certain date specified in said regulation, shall be held by the fur dealer or buyer and notice given to the representative of the Conservation Commission and disposition shall be made in accordance with the instructions of said representative. All of which, at least, indicates that by reference to resident hunters offering furs for sale, the intent was to exclude all other hunters from selling such products and this would apply to nonresident hunters.

Section 45, (B) (C) (D) of the Wildlife Code requires one to have

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a resident permit in order to sell products of fur-bearing animals.

Under definitions in Section 55, of the Wildlife Code it defines "Legality of wildlife species taken in other states" and reads:

"The laws in effect where wildlife is taken shall determine the legality of the taking and the permitted possession limits; otherwise when such wildlife is transported into Missouri, this code shall apply as soon as such wildlife enters this state, except, however, interstate shipments when neither the point of origin nor point of destination is in Missouri; provided, that the burden of proof shall be upon the person in possession of such shipments to show that such possession or transportation are not in conflict with this code."

Under the foregoing definition a nonresident may possess opossums in Missouri if the laws in effect where said opossums were taken, permitted the taking and possession thereof. However, any further disposition such as sale of said animals or the products thereof must be governed entirely by the Wildlife Code and Laws of Missouri. Therefore, in the absence of any authority under said Wildlife Code or Laws of Missouri authorizing such nonresident hunter to sell opossums in this state it cannot be done.

As to whether he may sell opossums or the products thereof in Missouri simply by reason of being a farmer under the provisions of Section 39, and definition of a farmer under Section 55 of the Wildlife Code, must be answered in the negative because the following definition and regulation, relating specifically to farmers, refers to only farmers who are residents of Missouri:

"Section 39. A farmer, as defined in this code, may take and possess wildlife and may sell the products of fur-bearing animals without permit when done as permitted by this code and only upon the farm where he resides; provided, that a farmer who is under seventeen(17) years of age may transport and sell without permit, within the county where he resides and in any adjoining county, the products of fur-bearing animals legally taken by him on such farm."

"Section 55. Any bona fide owner or lessee of lands, or his permanently employed hired hand, or any member of the immediate household of such owner, lessee or employee within the state, who

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is a citizen of the state and who actually resides upon and operates such land exclusively for agricultural purposes."

CONCLUSION

Therefore, it is the opinion of this Department that the sale of rabbits, that is, wild rabbits, is prohibited to everyone, resident or nonresident, in Missouri. Furthermore, that a farmer taking the opossums on his Illinois farm cannot sell same or the product thereof in the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH:mw

ST. LOUIS:
FLOOD CONTROL:
COOPERATIVE AGREEMENTS:
LEVEES:

St. Louis in contract with United States for flood control project may sign contract providing city will provide lands and easements for the project, will hold the United States free from damages, and maintain and operate the flood control works after completion.



July 3, 1957

Honorable William A. Geary, Jr.
Representative, 14th District
5367 Queens Avenue
St. Louis 15, Missouri

Dear Mr. Geary:

This is in answer to your request for an official opinion from this office which reads as follows:

"The citizens of St. Louis, in the Bond Issue election of May 26, 1956, voted the sum of \$7,547,000.00 as the City's share of a proposed Mississippi River flood control program, the remaining cost to be borne by the Federal Government. In accordance with Federal legislation (33 U.S.C.A., 701 c et seq.), the City, as local sponsor of this project is required to furnish assurances satisfactory to the Secretary of the Army that it will

a) provide without cost to the United States all lands, easements and rights of way necessary for the construction of the project.

b) hold and save the United States free from damages due to construction works.

c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army.

"I would appreciate receiving an opinion from your office whether the City of St. Louis has legal authority under constitutional, statutory and charter provisions to acquire lands by eminent domain for levee and flood control purposes. Also whether the City has necessary legal

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authority to provide the assurances outlined in (b) and (c) above. In addition the proposed levees and flood walls will necessitate construction of new sewers, drainage and pumping facilities, which upon completion will be turned over to the Metropolitan St. Louis Sewer District for operation and maintenance. I would likewise appreciate your opinion whether the assurances required from the City in regard to acquiring land, and saving the United States free from damages due to construction work may extend to that portion of the work involving sewage, drainage and pumping facilities."

In 1936, Congress passed a Flood Control Act, 33 U.S.C. 701a et seq. One of its purposes is, in cooperation with the states or political subdivisions thereof, to construct levees and dams as protection against damaging flood waters. It provided, among other things, that no state or political subdivision thereof would receive any aid or assistance from the Federal government (hereinafter referred to as the Government) unless they made assurances satisfactory to the Secretary of the Army that they will:

- a) provide without cost to the United States all lands, easements and rights of way necessary for the construction of the project;
- b) hold and save the United States free from damages due to the construction works;
- c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army.

We understand the City of St. Louis (hereinafter referred to as the City) proposes to cooperate with the Government in constructing levees and dikes which will extend the entire length of the eastern boundary of the City. The dikes and levees are to protect the adjacent areas from a flood stage of 52 feet. The total cost of the project will exceed \$100,000,000, and the City will provide \$7,547,000.00 of this cost. The citizens of the City voted this sum at a bond issue election on May 26, 1956.

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That the City can enter into contracts or cooperative agreements with the Government or its agencies, is not subject to doubt. Article VI, Section 16, Constitution of Missouri (1945), provides, among other things, that "any municipality or political subdivision of this state may contract and cooperate --- with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law." (Emphasis ours.) This constitutional grant was further implemented by Section 70.220, RSMo 1949, which authorizes the City to contract and cooperate with a duly authorized agency of the United States "provided, that the subject and purpose of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision." (Emphasis ours.) We shall later determine whether the assurances required of the City are "within the scope of the powers" of the City.

In addition to the foregoing, Section 70.330, RSMo 1949, authorizes the City, among other things, to contract and cooperate with the United States over lands "which are subject to injury by such overflow, or which may require the building of such sewers."

Before we determine whether the City can assure the Government, it will "provide without cost to the United States all lands, easements and rights of way necessary for the construction of the project," we deem it necessary to ascertain the authority of the City to acquire lands by eminent domain for levee and flood control purposes to protect its citizens from damaging flood waters.

Section 82.240, RSMo 1949, authorizes the City to make provision in its charter to acquire lands for public use by the exercise of the power of eminent domain by condemnation proceedings for "public parks, cemeteries, penal institutions, hospitals, right of ways for sewers, or for any other public purpose, and to provide for managing, controlling and policing the same." Under Article I, Section 1 of its charter, the City is specifically given power (9) "to condemn private property, real or personal, or any easement or use therein for public use - - -," (15) "to acquire, provide for, construct, regulate and maintain and do all things relating to all kinds of public buildings structures, markets, places, works and improvements," and (35) "to do all things whatsoever expedient for promoting or maintaining the comfort, education, morals, peace, government, health, welfare, trade, commerce or manufacture of the City or its inhabitants."

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These sections of the statute and charter clearly empower the City to erect and maintain levees designed to protect the City from flood waters of the Mississippi River. The acquisition of property and construction of a levee, for the preservation and protection of the health of the people of a community is a sufficient public purpose to justify the use of the power of eminent domain. See *Morrison v. Morey*, Mo. Sup., 48 S.W. 629, 633 (1). That such provisions properly may be included in a City charter, and control the establishment of levees within such City, was confirmed by the Missouri Supreme Court in *In re East Bottoms Drainage and Levee District*, 258 S.W. 89, 91, wherein it said:

"But we also hold that, even if said general statutes would authorize this proceeding in the absence of a provision in the Kansas City Charter on the subject, the Charter provision of Kansas City providing for such levees and drains within the city is a matter of local municipal concern, and, therefore, properly included in such charter, and controls the establishment of levee and drainage districts in said city. - - - Indeed, it may be said to be a matter of common knowledge that all cities of any considerable population in this state have from the earliest time, either by special charter or general law, been authorized to construct sewers and levees belonging to the same class of necessary local municipal improvements. - - - We must therefore rule that the charter provisions of said city relating to the establishment of levees and drains within said city are a matter of essential local municipal concern properly contained in the freeholders charter of Kansas City and prevail over the general law on the subject, if there is any difference or conflict between them."

To further buttress this argument, we think it necessary to call your attention to the fact that Section 1, of Article XVII, of the City's charter enumerates the purposes for which the City may issue bonds, and includes "river and other public improvements which the City may be authorized or permitted to make"; and after the levees and dams are constructed, the City has the duty to maintain and operate them. (Emphasis ours.) Article XIII, Section 13 of the Charter, provides that the Street Division of the Department of Streets and Sewers shall have charge of "wharves and levees."

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Therefore, since the City has been expressly empowered by constitutional and statutory enactment to enter into a cooperative agreement with the Government "within the scope of its powers," and since the City is authorized by statute and its charter to acquire lands necessary for the construction of dams and levees, and since the charter of the City provides that the Street Division of the Department of Streets and Sewers "shall have charge of the repairing, cleaning and maintenance of all - - - wharves and levees," it is our considered opinion that the City, as local sponsor of a flood control project and in cooperation with the Government in the construction of said project, has the authority to assure the Government that it will

- a) provide without cost to the United States all lands, easements and rights of way necessary for the construction of the project; and
- b) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army.

In your opinion request, you stated that in building the levees and flood walls it will necessitate the construction of new sewers, drainage and pumping facilities which upon completion will be turned over to the Metropolitan St. Louis Sewer District (hereinafter referred to as the District) for operation and maintenance. You want to know if the two assurances from the City just mentioned may extend to that portion of the works involving sewage, drainage and pumping facilities. Before we answer that phase of your opinion request, we must digress just a moment.

Prior to July 1, 1954, the date the District took over all sewers in Metropolitan St. Louis, the City had the authority to condemn land for sewer purposes, and the Sewer Division of the Department of Streets and Sewers had charge of the repairing, cleaning and maintenance of all sewers and drains and the disposal of sewage. In pursuance of Section 30 of Article VI, Constitution of Missouri, a Board of Freeholders was created who drafted a charter for the District which was submitted and approved by the voters of the City and St. Louis County on February 9, 1954. It provided, among other things, that the District is a "body corporate, a municipal corporation, and a political subdivision of the state, with power to - - - sue and be sued, contract and be contracted with - - -." Section 3.010 of the charter of the District provides, among other things, that on July 1, 1954, the District shall have the control, possession, jurisdiction, operation, and maintenance of the existing

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sanitary and storm water sewer systems of the City and County. Section 3.020 of the District's charter provides, among other things, that the district shall have the power to condemn private property for sewer purposes.

Thus, from the foregoing, it becomes apparent that the District instead of the City now has the duty to construct new sewers, drainage and pumping facilities. However, this does not prevent the City from extending the two assurances just mentioned above to that portion of the works involving sewage, drainage and pumping facilities. This latter part of the works is all an essential and integral part of the levees and flood wall. We are not unmindful of the fact that it is possible that a flood control project, without proper safeguards, could have the effect of impeding rather than improving a flood control project. It is true this latter part of the works will be connected with the district's sewer system and the District will be indirectly benefited thereby, but this works is nevertheless a part of the flood control project over which the City has jurisdiction.

Thus, we hold that the City has the authority to assure the Government that the two assurances just mentioned above may extend to that portion of the flood control project involving sewage, drainage and pumping facilities. When, after completion, this part of the works is turned over to the District for operation and maintenance, this might well be the subject of contract between the owner of the flood control project (the City) and the District. But, it does not follow that this part of the works ceases to be a part of the flood control project, or that the City loses jurisdiction over this part of the works. It would appear that the City and the District had a type of concurrent jurisdiction over this part of the project.

Your final question deals with the authority of the City to assure the Government that it will "hold and save the United States free from damages due to the construction works" and if so, whether this assurance will extend to that portion of the works involving sewage, drainage and pumping facilities. To us, it is apparent that the City can make this assurance, and further, that it can extend to all portions of the works, because as we previously stated, the sewage, drainage and pumping facilities are an essential and integral part of the flood control project.

As authority for this proposition, we call your attention to the fact that the constitutional and statutory enactments heretofore cited expressly empower the City to enter into co-operative agreements with the Government, so long as the agreements are "within the scope of the powers of the City." (In the premises, the agreements are within the scope of the powers.) However, the specific terms and conditions of such agreements are

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not spelled out. In such instance, the rule is firmly established that where there is an express grant to a City without the method or details of exercising such power prescribed, the City council has authority to exercise the power granted to it in any reasonable and proper manner. (Emphasis ours.) See *Dodds v. Kansas City*, Mo. Sup., 152 S.W. 2d 128; *Ballentine v. Nester*, Mo. Sup., 164 S.W. 2d 378.

In the case of *Arkansas-Missouri Power Corp. v. City of Kennett*, Mo. Sup., 156 S.W. 2d 913, a municipal contract containing wage and hour provisions was attacked on the ground that the statutes regulating third class cities did not authorize them to adopt wage and hour ordinances with reference to municipal contracts. The Missouri Supreme Court, en banc, in disposing of this argument, stated at page 917:

"The fallacy of this argument lies in the fact that it ignores the principle that where a corporation, private or municipal, is given power to perform a certain act, it is necessarily left with a large discretion as to the manner in which such act is to be performed. (Citing cases) As stated, we think it to be conceded that the City of Kennett unquestionably has power to build, own and operate a municipal power plant. It necessarily follows that it has the power to enter into a contract with a builder or construction company for the erection of such plant. The exact terms and provisions to be inserted therein must, in the nature of things, vary with the particular conditions surrounding this specific project. Such a contract must necessarily contain all reasonable provisions, not forbidden by the State or Federal Constitutions or the charter of the city or general state law, which have a tendency to effectuate the object involved."

CONCLUSION

It is, therefore, the opinion of this office that the City of St. Louis in cooperation with the federal government for a flood control project has the authority to assure the federal government that it will:

- a) provide without cost to the United States all lands, easements and rights of way necessary for the construction of the project,
- b) hold and save the United States free from damages due to the construction works,

c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army.

It is further our opinion that the assurances just mentioned may extend to that portion of the works involving sewage, drainage and pumping facilities.

The foregoing opinion, which is hereby approved, was prepared by Assistant Attorney General George E. Schaaf.

Yours very truly,

John M. Dalton
Attorney General

By
Robert R. Welborn
Assistant Attorney General.

GES/lc/b1

COUNTIES:
CHARTER FORM
OF GOVERNMENT:
ST. LOUIS COUNTY
POLICE DEPARTMENT:

St. Louis County Police Department has
authority to enforce state law in
incorporated or unincorporated areas
in the county.



August 8, 1957

Honorable Edward W. Garnholz
Prosecuting Attorney
St. Louis County
Clayton, Missouri
Dear Sir:

My office is in receipt of your request for an opinion
which reads as follows:

"The Board of Police Commissioners of
St. Louis County have requested that
I obtain a ruling from you setting
forth the legal powers of the St. Louis
County Police Department at large.
Specifically, does the St. Louis County
Police Department have the authority
to enforce State laws in the incorpo-
rated areas as well as in the unincorpo-
rated areas?"

It is believed that the constitutionality of the formation
of the St. Louis County charter government, in regard to the
functions of the County Police Department, is covered thoroughly
in the case of State ex inf. Dalton v. Gamble, et al, 280
S.W. 2d 656. In that case an information in the nature of a
quo warranto attacked the authority of the county police depart-
ment to take over and perform the functions formally vested
in the sheriff and constables of the county.

The action was against the Board of Police Commissioners
and Superintendent of Police of St. Louis County. In that
case the Supreme Court stated at l.c. 657:

"On March 28, 1950, the county of
St. Louis, by a vote of its people,

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adopted a charter for its own government pursuant to §18, Art. VI, of the 1945 Constitution of Missouri. Art. II of the charter provided that among the 'County Officers' to be elected were four constables and a sheriff. It also provided that the 'elective County Officers * * * shall have all the powers and perform all the duties provided by law, except as otherwise provided by this charter' and in the event of a vacancy in any elective county office 'the same shall be filled by the County Supervisor subject to confirmation by a majority of the Council.' Art. III, § 6 of the charter provided: 'The governing body of the County shall be the County Council which, except as otherwise provided in this charter, shall have and exercise all the powers and duties vested in counties and county governing bodies by the Constitution and laws of the State of Missouri and by this charter. All legislative power of the county shall be vested in the Council.'

It appears proper here to further quote from the above Gamble opinion where it is said at l.c. 660 as follows:

"A County under the special charter provision of our constitution is possessed to a limited extent of a dual nature and functions in a dual capacity. It must perform state functions over the entire county and may perform functions of a local or municipal nature at least in the unincorporated parts of the county. These are constitutional grants which are not subject to, but take precedence over, the legislative power. St. Louis County alone has the right to determine 'the number, kinds, manner of selection, terms of office and salaries' of its county officers. There can be no doubt that this is a proper constitutional provision, since the people of the state are sovereign, Art. I, §1, and they 'have the inherent, sole and exclusive right to regulate the internal government and police thereof

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* * *. Art. I §3. The constitution is harmonious in recognizing an exception to the provision for general laws for the organization and classification of counties. Art. VI, § 8."

In State ex rel McKittrick v. Williams, 346 Mo. 1003, 144 S.W. 98, 1.c. Mo. 1014, the court quoted from the case of Farmers' Mutual Fire Insurance Company v. Hunolt (Missouri Appeals) 81 S.W. 2d, 977 as follows:

"His authority is county wide. He is not restricted by municipal limits. For better protection and for the enforcement of local ordinance the cities and towns have their police departments or their town marshals. Even the State has its highway patrol. Still the authority of the sheriff with his correlative duty remains. It has become the custom for the sheriff to leave local policing to local enforcement officers but this practice cannot alter his responsibility under the law. Usage cannot alter the law."

The St. Louis county charter provisions involved are contained in the Gamble case on page 658, where the following is stated:

"The central purpose of the amendment is shown by § 4.10, Art. II of the charter as amended, which reads as follows:

"All powers and duties of the offices of Sheriff and Constables of the County with respect to preservation of order, prevention of crimes, and misdemeanors, apprehension and arrest, conserving the peace, and other police and law enforcement functions other than those relating to civil actions and the detention, care, custody and control of persons or prisoners in the County Jail, provided by law, shall be vested in and performed by the Superintendent of Police and the Department of Police of the County as hereinafter provided, and the Sheriff

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and Constables of the County shall have no power or duties with respect to the same except when called upon by the Superintendent of Police as hereinafter provided.'

"Section 49, Article V of the amendment makes provision for a department of police consisting of a board of five police commissioners, a superintendent of police and the department personnel. The superintendent of police is appointed by the board of police commissioners and the superintendent selects the other personnel on the basis of merit.

"The substantial duties and powers of the superintendent and the police department appear in the charter as amended, § 49.10 of Art. V, in part, as follows:

"The Superintendent of Police and the Department of Police, including the duly authorized officers, agents and deputized representatives thereof shall have all the powers and perform all the duties of the Sheriff and the Constables, as provided by law, except those powers and duties expressly vested in the Sheriff and Constables of the County under Section 4.10 of this Charter. In addition thereto, the Superintendent and the Department of Police shall enforce the ordinances and orders of the Council, and have such other powers and duties as may be provided by ordinances of the Council, including, but not limited to, the performance of police duties in incorporated areas of the County under contract authorized or entered into by the Council with the governing body of any such incorporated area. He shall also have the power to deputize members of the police departments of the various municipalities of the County under such standards, conditions and regulations as the Board of Police Commissioners shall approve.'"

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It must be noted that ordinance #570-1955 provides for the operation and administration of the department of police. That ordinance in Section 23.07, Subsection 1, provides for the powers and duties of the superintendent and the department as follows: "1) To have and perform the duties of sheriff and constable as provided by law, including the power to arrest with or without warrant * * *. Such powers and duties of the Superintendent and the Department shall include full responsibility for the enforcement of all State laws throughout the entire St. Louis County, and for the enforcement of ordinances and orders of the County Council in the areas of the county outside the incorporated cities."

It will be seen from the quotations herein that the Supreme Court has ruled that St. Louis County had authority to provide by charter for county officers, and that the sheriff has been delegated to be a county officer. It is believed that not only has a proper charter provision been made, but that the ordinance in regard to "the mechanics of law enforcement in St. Louis County, * * * in harmony with the 1945 Constitution of Missouri," (State v. Gamble, supra, l.c. 662) has been made and provided. In considering this ordinance and the charter, the Supreme Court said, Gamble case l.c. 662:

"The charter as amended and the ordinances are valid enactments and take precedence over general statutory provisions with respect to the agencies for law enforcement in the various counties of the state, being exceptions thereto provided by the constitution. Tremayne v. City of St. Louis, 320 Mo. 120, 6 S.W.2d 935, 940-941. The amended charter and these ordinances of St. Louis County make adequate provision for the enforcement of state laws in St. Louis County. The sheriff and the constables of St. Louis County are bound by the provisions of the charter as amended and by the ordinances specified."

It is believed that the St. Louis County Police Department, under the authority of the Missouri Constitution, the charter

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amendments and the ordinance mentioned herein, has authority to enforce state laws in incorporated areas as well as unincorporated areas. It must not be forgotten, however, that in keeping with the language of State v. Williams, supra, the duty to enforce state laws in municipalities does not fall upon the shoulders of the county police alone.

CONCLUSION

It is therefore the opinion of this office that the St. Louis County Police Department has authority to enforce state laws in incorporated and unincorporated areas within the county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Faris.

Yours very truly,

JOHN M. DALTON
Attorney General

JWF:db

ASSESSMENT OF STATE PROPERTY
BY A SECOND CLASS CITY FOR
STREET IMPROVEMENT:



The property of State Hospital No. 2, which is owned by the State, located in the City of St. Joseph, Missouri, is not subject to assessment by the city for the purpose of repairing a street which runs through the property of the aforesaid State Hospital No. 2.

September 9, 1957

Honorable C. Rouss Gallop, Director
Department of Public Health & Welfare
State Office Building
Jefferson City, Missouri

Dear Mr. Gallop:

Your recent request for an official opinion reads:

"In St. Joseph, Missouri, Federal Highway 36 runs East and West across the property of State Hospital No. 2. I have word from the State Hospital that approximately two city blocks of this street is badly in need of repair. We have been asked to join in on the cost of this repair work (by the city) but I have no idea what it amounts to in dollars and cents. Furthermore, I am of the opinion that the State is not responsible for these repairs anyway, but I would like to have your opinion as to the State's responsibility as applying to this repair work."

On August 24, 1950, this department rendered an opinion, a copy of which is enclosed, to R. L. Groves, Fiscal Officer, Adjutant General's Office, in which we held that the property of the state is not subject to local assessment by a city of the third class for the paving of streets. This opinion is not immediately applicable to the City of St. Joseph, which is the subject of inquiry, in view of the fact that St. Joseph is a first class city. However, in that opinion, certain principles are laid down which we do believe are pertinent. On page 3 of the opinion, reference is made to the case of Normandy Consolidated School District v. Wellston Sewer District, (Mo. App.) 77 S.W. 2d 477. We note the following at 1.c. 478:

"But even though the legislative body has the unquestioned power to require public property located in a benefit district to pay its proportionate share of the cost of the benefit,

Honorable C. Rouss Gallop, Director

yet the rule is that public property, which is made use of as an integral part of government in the exercise of a governmental function, is nevertheless to be held exempt from any such special assessment unless in the enactment of the law the lawmakers have manifested a clear legislative intent that such public property shall be subject to the assessment. * * *."

In the light of the above holding in the Normandy case, we state that : "Therefore, we must look to the statutes which authorize cities of the third class to levy assessments for the paving of streets and determine whether or not authority has been given such cities to assess state property for such local improvements. * * *."

In the case of third class cities no such legislative authority was found. Neither does an examination of the statutes reveal that any such authority is vested in first class cities.

In reaching this conclusion, we have taken into account Section 88.333, RSMo 1949, which reads:

"In all cities of the first class in this state wherein any public improvement is made for which special tax bills are issued against private property for the payment thereof, such tax bills shall also be issued against all county or other public property, church property and all cemeteries, railroad rights of way and property under the control of or owned by public school districts, in the same manner and to the same effect as such tax bills are issued against other private property chargeable for such public improvements; provided, that payment of such tax bills may also be enforced as a prior claim against any general revenue that may have been or shall be received by the authorities managing such property, and suit or other proceedings may be prosecuted therefor the same as any other action at law or in equity."

It will be noted that the above section authorizes the issuance of tax bills against "all county and other public property"

In order to find the meaning of the term "other public property," from the standpoint of determining whether it includes property owned by the state, we look to the case of City of Edina

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To Use of Pioneer Trust Company v. School District of City of Edina, 267 S.W. 112. At l.c. 114, the Missouri Supreme Court, en Banc, states:

"The Kansas City Court of Appeals, in Thogmartin v. Nevada School District, 189 Mo.App. 10, 176 S.W. 473, had before it the precise question and held that public school grounds were not included in the general language 'all property' used in designating the property which should be charged with special taxes for paving an adjoining street, under the cases of Clinton v. Henry County, 115 Mo. 557, 22 S.W. 494, 37 Am. St. Rep. 415, and City of St. Louis v. Brown, 155 Mo. 545, 56 S.W. 298, and Mullins v. Mount St. Mary's Cemetery Ass'n, 239 Mo. 689, 144 S.W. 109, it also held that such special assessment against school property was not authorized by Rev. St. 1909, § 9254, as re-enacted by Act April 3, 1911 (Acts 1911, p. 337), which is as follows:

'All lands owned by any county, or city, and all other public lands, cemeteries and railroad rights of way, fronting or abutting on any of said improvements, shall be liable for their proportionate part of the cost of such improvement, and tax bills shall be issued against such property as against other property.'

" - but only a general judgment shall be recovered therefor against such county, city or railroad company.

"The learned court held that (page 13) 'a school district is not a part of the county, nor is it a municipal corporation. State ex rel v. Gordon, 231 Mo. 547, loc. cit. 575. And the title to its property is vested in the school district as a public, and not as a municipal, corporation (State ex rel. v. Henderson, 145 Mo. 329). * * * Hence, under the rule of statutory construction that where particular terms are used, followed by general terms, the latter include only subjects of the same nature and kind as are particularly mentioned,' the lands of school districts ought not to be deemed included within the meaning of the phrase all 'other public lands,' and furthermore (page 14) that 'school grounds do not and cannot come properly within the term

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"public lands." * * * The fact that it [the Legislature] did not mention them is strong evidence that it did not intend them to be included,' and that 'The statute in question provides for a general judgment in the case of a county, city, or railroad company, but in this connection mentions nothing which by any stretch of judicial construction would include a school district.'"

In the light of this determination of the meaning of the term "public property" we do not believe that this term, as used in Section 88.333, supra, could be construed to mean state property, such as State Hospital No. 2 in St. Joseph. Therefore, in the absence of such assessing authority against state property, we must conclude that first class cities, like third class cities in this respect, do not have the power to subject state-owned property, which is the subject of your inquiry, to assessment for the paving of streets upon which state-owned property abuts.

CONCLUSION

It is the opinion of this department that the property of State Hospital No. 2, located in the City of St. Joseph, Missouri, is not subject to assessment by the city for the purpose of repairing a street which runs through the property of the aforesaid State Hospital No. 2, which is owned by the state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW/bi/vlw

CORONERS:
PROSECUTING ATTORNEYS:
CRIMINAL LAW:

No discretion vested in coroner as to report required by Section 58.370. It is not necessary for report to be made by sworn affidavit. Report must be based upon the verdict of the coroner's jury. Judge has no discretion other than to issue warrant required by Section 58.370. The prosecuting attorney may enter state's nolle prosequi.



December 20, 1957

Honorable Edward W. Garnholz
Prosecuting Attorney
St. Louis County
Court House
Clayton, Missouri

Dear Mr. Garnholz:

This office is in receipt of a request from you for an opinion. The request is as follows:

"Some question has arisen concerning the interpretation of RSMo, Sec. 58.370--Death by Felony - Duty of Coroner. We would appreciate your opinion as to the following questions:

1. Does the Coroner have any discretion as to whether he must inform a Magistrate Judge of information made known to him at a Coroner's Inquest; and must such information by necessity consist of a sworn affidavit by the Coroner before the Magistrate Judge?
2. Must a Coroner make such sworn affidavit before a Magistrate when the affidavit is based purely upon the verdict of his Coroner's Jury at the inquest?
3. Does the Magistrate receiving such information have any discretion as to the issuing of a warrant for apprehension of the individual involved in the case?
4. In the event such a sworn affidavit by a Coroner is made before a Magistrate, and is based solely on the verdict of homicide by the Coroner's Jury, must the Prosecuting Attorney proceed with the matter or may he dismiss the charge where, in his opinion, there is insufficient evidence to sustain a criminal charge?"

Honorable Edward W. Garnholz

It is thought best here to quote the section of the statute concerned. Section 58.370, RSMo 1949, is as follows:

"The coroner, upon an inquisition found before him of the death of any person by the felony of another, shall speedily inform one or more magistrates of the proper county, or some judge or justice of some court of record, and it shall be the duty of such officer forthwith to issue his process for the apprehension and securing for trial of such person."

The word "shall" as used in the above section does not appear to need any clarification. This is a duty required of the coroner, believed to be in furtherance of the cardinal purpose of the existence of the office. Compliance with this law is obligatory, if it were not there could be no purpose in its enactment.

The question here, however, is as to whether the coroner shall inform the magistrate judge. It is believed that full compliance can be had by the informing of "some judge or justice of some court of record," as well as by informing a magistrate of the county. By inference it must be added here that the court of record should be a Missouri Court with jurisdiction of the county concerned. Since an affidavit is not mentioned in the statutory requirement, it is not deemed that an affidavit is necessary. The coroner in forwarding the information is completing what is deemed to be a ministerial task prescribed as an official duty.

Again, absent direction as to how the task shall be completed, it appears from Section 58.370 that the information of the signing of the inquisition in such form as to apprise the magistrate or judge or justice of the necessary facts would be sufficient.

Since it is not prescribed in the statute that a sworn affidavit of the report of the inquisition is necessary, the second question which you ask must be modified accordingly. The question then is whether the information from the coroner to be given to a magistrate or judge or justice, should be based purely upon the verdict of the coroner's jury. This, it is felt, can be answered in the affirmative.

It is believed that the particular information required by Section 58.370 should be fully contained in the verdict required by Sections 58.310, 58.350 and 58.360, RSMo 1949. Each of these sections apply to the requirements of the composition of the coroner's jury verdict. The jury is to be charged to find whether or not the death occurred by felony or accident. If the death occurred by felony the jury is charged to declare the principals and the accessories and all the material circumstances relating thereto. The foregoing is in accordance with the charge to be given by the coroner in accordance with Section 58.310, mentioned supra.

Section 58.350 requires that the evidence of witnesses be taken down and if it relates to the trial of any person concerned in the death, the witnesses are to be bound by recognizance for appearance in the next term of court. The coroner is required to return to the same court the inquisition, written record and recognizance taken by him.

Section 58.360 requires the coroner's jury to view the body, hear the evidence, and draw up and give to the coroner their verdict in writing. The section further requires that the verdict be signed by the coroner. It may be seen from the text of the foregoing sections that it is not expressly required that all of the above be made in the information required by Section 58.370. For that latter section, the clear letter of the statute would meet compliance by a report to some judge or justice or some court of record of the context of the verdict as signed by the coroner.

It will be noted that although there is definite instruction in chapter 58 in regard to the binding of witnesses by recognizance, no other provision is made than that in 58.370 for the arrest and detention of the principal or accessories found by the inquisition. In order to meet the requirements of Section 58.370, the information furnished thereunder must be based upon the verdict of the coroner's jury at the inquisition. This is in accordance with the direction of the statute.

In answer to the third question which you ask in your letter, it is believed that the issuance of a warrant for the apprehension of the individual alleged to be involved is a mandatory duty upon the court receiving the coroner's report. The statute reads that it shall be the duty of such officer forthwith to issue his process for the apprehension and securing for trial of such person.

The Missouri Supreme Court stated in *State Ex Rel. Taylor v. Wade et al*, 231 SW2d 179, 360 Mo. 895 at l.c. 899 as follows:

"* * * * Certainly statutes that use the word 'shall', and then provide a penalty for failure to do what is required, are mandatory statutes. (See 50 Am. Jur. 47-57, Sec's. 24-35.) As shown by this discussion in American Jurisprudence, this question usually arises in determining whether failure to comply with a statutory provision makes an act or proceeding void. (The cases cited by respondents are such cases, namely, *State ex inf. McAllister v. Bird*, 295 Mo. 344, 244 SW 938; *Hudgins v. Mooresville Consolidated School District*, 312 Mo. 1, 278 SW 769; *Cantley v. Village of Mt. Moriah*, 226 Mo. App. 1230, 49 SW (2d) 275. See also *State ex rel. City of Berkeley v. Holmes*, 358 Mo. 1237, 219 SW (2d) 650.) When the statute [182] creates an official duty in

Honorable Edward W. Garnholz

the interest of the public it is a different matter; and when the General Assembly imposes such a duty upon a public officer, he has no discretion as to whether or not it should be performed."

In further regard to the meaning of the word "shall" in the matter of State Ex Rel. Moore et al v. Julian et al, 222 SW (2d) 720, l.c. 726, it was held by the Missouri Supreme Court as follows in regard to the discretion of the Labor Mediation Board: "It has no discretion to withhold its mediation facilities in any labor dispute between parties subject to the act, as here."

It is believed that the prosecuting attorney may dismiss a murder charge where, in his opinion, there is insufficient evidence to sustain it.

In the case of State v. Smith, 258 SW (2d) 590 at l.c. 595, the Supreme Court of Missouri stated as follows:

"We have discussed and ruled the only issue raised by the pleadings. Having determined that the prosecuting attorney has the discretion and authority, without the consent or permission of the circuit court or anyone else, to enter the State's nolle prosequi or dismissal in a pending criminal cause, it follows that respondent has no jurisdiction to further proceed in the case of State of Missouri v. George Robert Fitzgerald, now in the Circuit Court of Andrew County, Missouri."

CONCLUSION

It is therefore the opinion of this office that there is no discretion vested in the coroner by Section 58.370 as to whether or not he shall inform the magistrate of the county or some judge or justice or a court of record of an inquisition found before him of the death of any person by the felony of another. There is no necessity for such information to be made by sworn affidavit of the coroner. The information required by law must be based upon the verdict of the coroner's jury at the inquest. Upon receipt of information transmitted in accordance with Section 57.370, RSMo 1949, it is the duty of the magistrate, judge, or justice to issue a warrant for the apprehension of the person or persons designated in the information. The prosecuting attorney may enter a nolle prosequi or dismissal in a pending criminal cause.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James W. Farris.

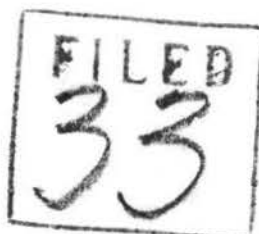
Yours very truly,

JOHN M. DALTON
Attorney General

JWF:db

LEGISLATURE:
OFFICERS:
TRAVEL EXPENSES:
LEGISLATIVE RESEARCH COMMITTEE:
COMMITTEES:
COUNCIL OF STATE GOVERNMENTS:

Members of the Committee on Legislative Research who were authorized by the Committee to represent the Committee at meetings of the National Legislative Conference in Miami, Florida, in 1955, and in Seattle, Washington, in 1956, could be legally reimbursed, from funds appropriated for the use of the Committee, for expenses necessarily incurred by them in attending such meetings.



January 24, 1957

Honorable Floyd R. Gibson
Senator, Eighth District
State Capitol Building
Jefferson City, Missouri

Dear Senator Gibson:

This refers to your request for an opinion with respect to reimbursement of expenses incurred by certain members of the Committee on Legislative Research on trips to Miami, Florida, in 1955, and to Seattle, Washington, in 1956.

The question presented is as follows: Could those members of the Committee on Legislative Research who were authorized by the Committee to represent the Committee at meetings of the National Legislative Conference in Miami, Florida, and Seattle, Washington, be legally reimbursed from funds appropriated for the use of the Committee, for expenses necessarily incurred by them in attending such meetings.

In answering this question, consideration must be given to three matters: (1) Was attendance at the meetings in question authorized by law? (2) Is there any prohibition, in the state constitution or statutes, against the reimbursement of members of the Committee for such expenses? (3) Were funds appropriated for the Committee which may be used for reimbursement of such expenses, assuming reimbursement is otherwise proper?

In order for the expenses to be paid, attendance at the meetings in question must be authorized by statute, either expressly or by implication. State ex rel. Lamkin v. Hackmann, 275 Mo. 47, 204 SW 513; State ex rel. Bybee v. Hackmann, 276 Mo. 110, 207 SW 64; State ex rel. Bradshaw v. Hackmann, 276 Mo. 600, 208 SW 445. In the Bybee case, quoted with approval in the Bradshaw case, the court, in considering the question of whether a stenographer employed by the State Board of Equalization should be paid, stated the general rule as follows:

Honorable Floyd R. Gibson

" * * * Has the State Board of Equalization authority under the law to employ a stenographer at the expense of the State? If such Board of Equalization * * * has any such authority, this authority must be bottomed on some statute. For it is fundamental that no officer in this State can pay out the money of the State except pursuant to statutory authority authorizing and warranting such payment. * * * But it is also well settled, if not fundamental law, that whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties, effectual, is conferred by implication. * * *"

In considering whether attendance at the meetings was authorized by law, let us look first at the nature of the meetings and then at the duties and powers of the Committee.

The meetings were the annual meetings of the National Legislative Conference, which is one of the organizations within the framework of the Council of State Governments. Its purpose has been briefly stated as follows: "To cooperate for more effective service to the legislatures and to aid in improving legislative procedures." (The Book of the States, 1956-7, p. 12.) It is understood that originally the conference included persons from the various states regularly engaged in legislative research, bill drafting, revision of statutes, operation of legislative libraries, and related activities; that more recently it has been expanded to include legislators responsible for the supervision of such activities and persons holding positions similar to those of the Chief Clerk of the House and Secretary of the Senate in Missouri; that some forty-one states were represented at the Seattle meeting and there was comparable representation at the Miami meeting; that the meetings are "workshop meetings" in which persons primarily concerned with particular phases of legislative activity meet in groups to consider matters in connection with their own work and, in addition, meetings of all persons attending are held to correlate the work of such groups and consider matters of common interest; and that, in general, the purposes of the meetings are to study problems arising in connection with legislative activities such as are mentioned above, to interchange information concerning the experience of the various states in these fields, develop improved methods and procedures, and to promote cooperation between persons who are responsible for this work in the various states.

Honorable Floyd R. Gibson

The duties and powers of the Committee on Legislative Research, which are set forth in Chapters 23 and 3, RSMo 1949, are extensive and stated in broad terms. They include, among other things, maintenance of a research and reference service on legislative problems, maintenance of a bill drafting service, supervision of the revision of statutes, and various investigatory functions.

For the purposes of this opinion, attention is directed specifically to the following provisions of Section 23.020, RSMo 1949:

"The committee here created shall perform the following services for the members of the general assembly:

* * * * *

"(2) Upon written request, make such investigation into legislative and governmental institutions of this state or other states as would aid the general assembly."

(Parenthetically, it is believed that, considering substance instead of form, the words "Upon written request" in the foregoing quotation, for our purposes, may be disregarded and that the Committee, which is composed of members of the General Assembly, may do on its own initiative that which would be its duty upon written request by a member of the Assembly.)

Attention also is directed to the following provisions of Section 23.050, RSMo 1949:

"The committee is empowered to obtain information upon the needs, organization, functioning, efficiency, and financial status of any department of state government or of any institution or agency which is supported in whole or in part by revenue of the state; to collect, and assemble information * * * upon questions of state-wide interest which may reasonably become subjects of legislative action or of legislative consideration; * * *."

Again, in Section 23.050, there is the following with respect to the biennial report which the Committee is to make to the General Assembly:

Honorable Floyd R. Gibson

" * * * Such report shall include any recommendations which the committee may have for legislative action as well as any recommendations which the committee may desire to make concerning the efficient and economical operation of the state government."

It also is pertinent that in Chapter 16, RSMo 1949, relating to the Commission on Interstate Cooperation, the Council of State Governments is declared to be a joint governmental agency of this state and other states, and the functions of the Commission are so stated as to express a policy, and to recognize the value, of full participation by legislative, executive, and judicial officials and employees of this state in the work of the Council of State Governments and the development and maintenance of contacts between them and those of other states through correspondence, conferences, and otherwise.

While there is nothing in the statutes which specifically authorizes attendance by members of the Committee on Legislative Research, or of its staff, at meetings such as are now in question, it is believed that, by implication, there is ample authority for sending representatives of the Committee to meetings of this nature.

To find such authority, one does not have to look beyond the provisions of Section 23.020, RSMo 1949, quoted above, with respect to "investigation into legislative * * * institutions of this state or other states." Certainly, one of the most efficient and effective means by which to investigate legislative institutions in other states is through the personal interchange of information concerning such institutions at meetings planned for that purpose and attended by persons actively engaged in legislative work in a great majority of the states. Correspondence, telephone calls, study of laws of other states, all serve a purpose; but the meetings provide a means of obtaining information more quickly, and they can give those attending the meetings a far clearer understanding of the real facts and current developments in other states than can be obtained in any other manner.

In addition, the powers and duties of the Committee set forth in the provisions of Section 23.050, RSMo 1949, quoted above, provide a basis for authority for representation of the Committee at such meetings. For example, information from other states may have a decided bearing upon the needs and efficiency of our state departments and agencies, which the Committee is empowered to investigate; and, likewise, it should be considered in determining what recommendations for legislative action, if

Honorable Floyd R. Gibson

any, should be made in the Committee's reports. And, although the meetings in question are concerned primarily with special phases of legislative activity, the comments in the preceding paragraph concerning the usefulness of such meetings in obtaining information are applicable here.

It is understood that prior to 1955 the Committee had been represented for some years at meetings of the National Legislative Conference by members of its staff, without any question being raised by anyone concerning the authority of the Committee to be so represented; and such administrative interpretation of the law is entitled to some weight. In so far as authority for attendance at the meetings is concerned, there is no basis for distinction between members of the Committee and members of its staff; the authority in both instances must be found in the same statutory provisions. Since the ultimate responsibility for the work of the Committee rests with the members of the Committee, and their point of view may well be different from that of the staff members, there would appear to be at least equal reason for Committee members to attend the meetings as there is for staff members to do so.

The decision whether the Committee should be represented at a particular meeting (and, if so, by whom) calls for the exercise of a considerable degree of discretion, and it is readily understandable that there may be differences of opinion. However, someone must have the authority to decide, and we believe that that authority necessarily is vested in the Committee. In connection with the two meetings under consideration, the Committee exercised its authority by duly adopted resolutions authorizing certain persons to attend the meetings, and the legality of such action cannot properly be questioned merely because someone else might have reached different decisions.

The conclusions reached above are fully supported by the decision in *State ex rel. Lamkin v. Hackmann*, 275 Mo. 47, 204 SW 513, in which the court held that the State Superintendent of Schools was entitled to reimbursement for expenses incurred in travel to a National Education Association convention outside the state solely because of his duty "to in every way elevate the standard and efficiency of the instruction given in the public schools of the State." In that case, the court stated, 1.c. 56-57:

" * * * This is a broad and comprehensive duty, and in fulfilling it, of necessity much is left to the discretion of the Superintendent. It is difficult to see how it is to be complied with unless the officer

whose official duty it is to elevate standards and efficiency shall have an opportunity to ascertain what standards and efficiency have been attained by teachers and educators in other states of the Union. * * * It is, we think, necessary if standards and efficiency in education in this State are to be kept abreast of the progress in other States, that the head of the public school system should be advised as to what educators elsewhere are doing. No better way perhaps for doing this has been devised than by conventions and conferences of the leaders in educational progress. That it is possible for the privilege of attending such conventions at the expense of the State to be abused is no argument in favor of entirely cutting off the necessary privilege. If it is proper and necessary to attend these conferences, some one must be vested by law with the authority of deciding upon the expediency of it. We think the question of the necessity and expediency of incurring the expense in issue for the purpose mentioned has been by the statute conferred on the Superintendent of Schools, and not upon the State Auditor. If the privilege be abused the people exercising their political power can correct the abuse at the polls. Obviously we are not holding that if the expenses incurred were for travel which, patently, had no relevancy to the Superintendent's statutory duties that the Auditor would be bound to audit them, merely because the Superintendent had approved them. That situation is not presented by the record before us."

We turn now to the question whether reimbursement of expenses incurred by Committee members in attending the meetings is prohibited by the state constitution or statutes. With respect to members of the Committee, the Constitution, Art. III, Sec. 35, provides:

" * * * The members of the Committee shall receive no compensation in addition to their salary as members of the general assembly, but may receive their necessary expenses while attending the meetings of the committee."

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Also, with respect to members of the Committee, Section 23.070, RSMo 1949, provides as follows:

" * * * The regular meeting place of the committee shall be in Jefferson City, Missouri, and after its inception and organization it shall regularly meet at least once every three months. A majority of the members of the committee shall constitute a quorum and its membership shall serve without compensation, but shall be entitled to mileage and necessary expenses incurred while attending any meetings of the committee within the state. Special meetings of the committee may be called at such time and place within the state as the chairman thereof may so designate; provided, no member shall receive for such expenses more than two hundred and fifty dollars for any period of two calendar years."

It should be noted at the outset that we are not concerned here with expenses incurred by members of the Committee in attending Committee meetings; Committee meetings were not held in Miami and Seattle. Hence, the provisions of statute just quoted which purport to limit the place of meetings to "within the state" and to prescribe a \$250 limitation upon expenses in attending Committee meetings are not material to the present issues.

As indicated by an exhaustive annotation in 5 A.L.R. 1182, there is a marked conflict in the court decisions concerning the effect of constitutional provisions which fix or limit the compensation, emoluments, perquisites, etc., of public officers. In numerous decisions, the courts, applying the doctrine "expressio unius est exclusio alterius," have held that, where the constitution prescribes a salary or per diem, or a salary or per diem and mileage, for members of the Legislature, statutes allowing reimbursement for expenses incurred for living costs while attending

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sessions of the Legislature are unconstitutional. Other courts have taken a contrary view on this and related questions; but one thing that the courts do agree upon is that there is a distinction between personal expenses, such as are mentioned in the preceding sentence, and legislative or official expenses, and that the latter may be paid. The theory apparently is that, even though the doctrine "*expressio unius est exclusio alterius*" is followed, the mention of compensation or compensation and one form of personal expense, while excluding other compensation or personal expense, does not exclude a different kind of expense, namely, legislative or official expense.

In a leading case, *State ex rel. Griffith v. Turner*, 117 Kan. 755, 233 Pac. 510, the court stated:

"All legislative expenses may be properly paid. The expenses that may be paid are not those that are incurred by a member of the Legislature because he is at the capital city; they are those that are incurred by him in the performance of his duties. They are legislative expenses, not personal expenses. The distinction between expenses that are legislative and those that are personal is that legislative expenses are those that are necessary to enable the Legislature to properly perform its functions, while those that are personal are those that must be incurred by a member of the Legislature in order to be present at the place of meeting - expenses for his personal comfort and convenience, which have nothing to do with the performance of his duty as a member of the Legislature.
* * *

In *Dixon v. Shaw*, 122 Okla. 215, 253 Pac. 500, 50 A.L.R. 1237, the court, after stating that the constitutional provision for per diem and mileage for legislators was intended to cover their living costs at the state capital, went on to say:

"* * * This, however, cannot be construed or held in any wise to impair the discretion of the Legislature in allowing expenses in event, in its judgment in the exercise of any of its powers, legislative or inquisitorial, it, or any of its members as committees or otherwise, should deem it

Honorable
Floyd R. Gibson

advisable or expedient to make investigation that required their leaving the capital, that the expenses incident thereto could not be provided for. * * *

In *Terrell v. King*, 118 Tex. 237, 14 SW2d 786, the Legislature had created an interim tax survey committee consisting of members and nonmembers of the Legislature and had provided that the committee members should receive as compensation \$10 per day for each day served, together with railroad fare, and hotel, telegraph, telephone, postage, and express expenses incurred in the discharge of their duties. The right of the legislative members of the committee to receive such compensation and expenses was challenged because of constitutional provisions with respect to per diem and mileage for members of the Legislature. The court held that they could not receive the \$10 per day compensation but that the provision for expenses was valid (assuming it did not cover expenses incurred in going to or from the capital, or residing in the capital, during a session of the Legislature). In upholding the payment of the expenses as legislative or official, instead of personal, expenses, the court said:

" * * * No one would question legislative disbursements for comfortable assembly halls and committee rooms, or for clerks, stationery, etc. Within the same category of legitimate expenses of the Legislature or of either house comes reimbursement to members for actual expenses reasonably incurred in order to perform duties devolving on duly authorized committees of the Legislature, or of either house, when such committee members are called to other points than the capital, or when called to the capital otherwise than during the sessions of the Legislature."

Applying the foregoing to the matter here under consideration, it appears that, if the constitution had merely provided that the members of the Committee should receive no compensation in addition to their salary as members of the General Assembly, there would have been substantial authority for holding that their expenses in attending Committee meetings were personal expenses for which they could not be reimbursed. The exception, "but may receive their necessary expenses while attending the meetings of the committee," was necessary in order to avoid this possible result.

Honorable Floyd R. Gibson

But, in view of the well-established distinction between personal and official expenses, it seems clear that the provisions in the constitution and statutes concerning expenses in attending Committee meetings do not prohibit reimbursement for the expenses now in question. The members of the Committee who attended the meetings of the National Legislative Conference in Miami and Seattle did so as representatives of the Committee performing duties on behalf of the Committee under the authorization and direction of the Committee. The expenses they incurred were official or Committee expenses, rather than personal expenses; and, as such, their reimbursement is not prohibited by the constitutional and statutory provisions relating to compensation and expenses of Committee members.

We turn now to the appropriation for the Committee for the current biennium, which reads as follows (Laws, 1955, p. 197):

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) for the use of the Committee on Legislative Research for the payment of salaries and expenses of the members, employees and clerical hire, other necessary expenses for the period beginning July 1, 1955 and ending June 30, 1957."

This appropriation contains no restriction concerning the use of the funds for travel expenses and clearly is in broad enough terms to permit the use of the funds for reimbursement of the expenses here in question.

CONCLUSION

Upon the basis of the foregoing, it is the opinion of this office that those members of the Committee on Legislative Research who were authorized by the Committee to represent the Committee at meetings of the National Legislative Conference in Miami, Florida, in 1955, and in Seattle, Washington, in 1956, could be legally reimbursed, from funds appropriated for the use of the Committee, for expenses necessarily incurred by them in attending such meetings.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Baumann.

Yours very truly,

JOHN M. DALTON
Attorney General

COUNTY COURT: County hospital has been established when
COUNTY properly originated and the bond election
HOSPITALS: has carried; no authority to pay from
the general revenue of a county for an
advertising or publicity campaign preceding bond election.



February 28, 1957

Honorable William E. Gladden
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Mr. Gladden:

Your January 15 request for an official opinion from this office was stated as follows:

"Section 205.200 provides for a special tax levy for county hospital maintenance.

"Question: Does the above mentioned section give the County Court the authority to levy such a tax after a county hospital bond issue has been passed, but before such a hospital is built and in active operation? There is some indication in our county on the part of the county hospital board to certify such a levy to the County Court for the purpose of hiring a skeleton staff and hospital director before or while the county hospital is being built.

"Section 205.230 provides for use of funds out of the county general fund for the improvement and maintenance of a public hospital.

"Question: Does this section or any other statutory section authorize the County Court to use general funds to pay the charges of a bonding company in a hospital bond election, or must

Honorable William E. Gladden

the charges of the bonding company for publicity, issuing bonds, etc., be taken out of the proceeds of the sale of the bonds?"

To assist us you enclosed a copy of an agreement between A. H. Bennett & Company and the county court of Texas County. Generally, that contract provided for A.H. Bennett & Company to make a financial study regarding the potential ability of the county to finance the hospital project, to retain attorneys, to furnish publicity, to print the bonds if the bond election carried, to pay the State Auditor's registration fee, and to prepare and distribute a prospectus to potential bidders, and it provided that the county would pay nothing to Bennett & Company if that company purchased the bonds but would pay ten dollars in the event the issue failed to carry and would pay two per cent of the par value of the bonds in the event the bond issue carried, but that Bennett & Company failed in its attempt to purchase. We return your copy of the agreement as requested.

The answer to your first question, we think, is definitely Yes. Section 205.200 states that the county court shall levy the special tax for hospital maintenance and improvement when the public hospital "shall have been established" as provided in Sections 205.160 to 205.340.

If the required petition, order of the court and other preliminary steps were properly followed and the issue carried, the hospital has been established within the meaning of the word "established" as used in this section.

In the case of the Appeal of Seagrave, 17 Atl. 412, (Pa.), and in a Vermont case, In re Pierpont's Will, 47 Atl. 780, the identical question as to when a hospital has been established was passed on. The courts in those cases, in effect, held that the word "established," as used in the wills in question, did not necessarily imply completed. They were established when sufficient steps had been taken to create, set up or settle firmly the plans for the hospital. Both Bouvier and Black define the word "establish" to mean to found, to create, to settle firmly, originate, prepare or to recognize.

Honorable William E. Gladden

When sufficient steps have been taken to provide for the bond election and after the project has proceeded to the extent that the election has been held, it has been established sufficiently within the meaning of the word in 205.200 not only to authorize but to require the county court to levy the tax as required in that section. We proceed, too, upon the assumption that the county court has appointed the five trustees as required by 205.170.

Your second question is actually in three parts; that is, does Section 205.230 authorize the county court to use general funds to pay the charges claimed under the contract mentioned above. In our opinion it definitely does not. Section 205.230 is authorization for the county court to make a levy for the hospital "improvement and maintenance" in addition to that which is levied upon the trustees' certification. We understand that this fund, too, would be deposited to the hospital fund account. It can be used only for improvement and maintenance just the same as can the fund created from the special tax levy. It does not become part of the general revenue fund of the county, and does not purport to authorize anything from the general fund.

The second part of question number two is: Does any other statutory section authorize the County Court to use general funds to pay the fees contracted for. We know of no such authorization. In the first place, you do not state whether or not it was budgeted for; then, secondly, even if it had been included in the budget we do not think authority existed for the county to incur such charges. The county court (Article VI, Section 7, 1945 Constitution) "shall manage all county business as prescribed by law." We fail to find wherein such authority is so prescribed. A county court can bind the county only when acting strictly within statutory authorization. Persons dealing with county courts are bound to take notice of their powers and authority. See *Bayless v. Gibbs*, 158 S.W. 590, 251 Mo. 492.

The third part of question number two is: Does Section 205.230, or any other section, authorize the court to pay the charges arising under this contract from the

Honorable William E. Gladden

proceeds of the sale of the bonds. We think very definitely the answer to this is No. Section 205.160 provides that the bonds "to establish, construct, equip, improve, extend, repair and maintain public hospitals" may be issued "as authorized by the general law governing the incurring of indebtedness by counties." Chapter 108 of the statutes governs bond issues generally. Note 108.110 and 108.180 provide that the money shall be used for the purposes for which the bonds were issued and none other.

Sections 108.310 to 108.350 provide a simple way to establish the validity of a bond issue. This can be brought by the county court's legal advisor - the prosecuting attorney. No section of the statutes that we can find empowers the county court to hire a firm of attorneys to render a "final approving legal opinion."

Section 205.160 clearly does not authorize the bonds to be issued for a "financial study," "attorneys' fees," "publicity," or a "prospectus" for the benefit of prospective purchasers.

There can be no question about the county's authority, and, furthermore, its obligation to pay the costs of the bond printing and auditor's registration fee. There is no authority, however, for a contract with another to act as its agent in paying such.

The result is, in our opinion, the contract hereto attached, is void.

CONCLUSION

From the foregoing, we conclude that the county court is not required to wait until a hospital building is completed or until a hospital is in active operation before levying the tax as required in Section 205.200. We further conclude that the recording fees and printing costs for bonds should be paid by the county out of the proceeds from the sale of the bonds, but not through an agent; that neither the proceeds from the sale of bonds nor the general funds of the county may be used for financial study, attorneys' fees, pub-

Honorable William E. Gladden

licity, or a prospectus incurred during a campaign for a hospital bond election, nor does the county court have authority to contract with anyone to pay them for the county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours,

John M. Dalton
Attorney General

RSN:lc

1 enclosure

FEEES AND SALARIES:
TOWNSHIPS:

Fees allowed township trustee as ex officio treasurer under Sec. 65.230 (3) RSMo, Cum. Supp. 1955 computed by applying statutory percentages to "all moneys" received and disbursed rather than to each transaction involving receipt and disbursement.



June 3, 1957

Honorable William E. Gladden
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Mr. Gladden:

The following opinion is rendered in reply to your request reading as follows:

"Section 65.230, Sub-Division 3, Missouri Revised Statutes, 1949, indicates that the township trustee, as ex officio treasurer, shall receive a compensation of two per cent for receiving and disbursing all moneys coming into his hands as such treasurer when the sum shall not exceed the sum of one thousand dollars and one per cent of all sums over said amount.

"I would appreciate an opinion from your office advising whether this section means that the township treasurer will receive compensation of two per cent on the first thousand dollars that he receives and disburses during his term of office and one per cent of all sums that are received and disbursed after the first thousand dollars that he handles during his term of office, or does this section mean that the treasurer will receive two per cent on all sums in each transaction up to one thousand dollars?

"There is some indication that some of the township treasurers in our county have been collecting two per cent on each sum received and disbursed as long as the particular

Honorable William E. Gladden

transaction did not exceed one thousand dollars, even though the treasurer may have received and disbursed an amount in excess of one thousand dollars during his term of office."

Subparagraph (3) of Section 65.230 RSMo Cumulative Supplement, 1955, provides:

"(3) The township trustee as ex officio treasurer shall receive a compensation of two per cent for receiving and disbursing all moneys coming into his hands as ex officio treasurer when the same shall not exceed the sum of one thousand dollars and one per cent of all sums over this amount."

The above quoted statutory provision is directed to "all moneys" coming into the hands of the officer. No ambiguity is discovered in the language used. We are considering a statute providing compensation for an officer and an applicable rule is stated in the following language from State v. Atterbury, 270 S.W. 2d 399, 1.c. 403:

"* * * (2) that statutes providing compensation for an officer must be strictly construed against the officer, * * *."

In Dohring v. Kansas City, 71 S.W. 2d 170, 228 Mo. App. 519, 1.c. 523, we find that the word "any" is equivalent to "all." To say that the quoted language of the statute involved allows the township trustee as ex officio treasurer to apply the percentages set out in the statute to each transaction "would be a violation of the rule of statutory construction which requires that every word, phrase and sentence must be given some meaning if possible." (State v. Hill, 262 S.W. 2d 581, 1.c. 583)

CONCLUSION

It is the opinion of this office that subparagraph (3) of Section 65.230 RSMo, Cumulative Supplement, 1955, requires that the compensation of a township trustee as ex officio treasurer be computed by applying the percentages set forth in the statute

Honorable William E. Gladden

to "all moneys" received and disbursed rather than to each transaction involving a receipt and disbursement of moneys.

The foregoing opinion which I hereby approve was prepared by my assistant, Julian L O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO:M:hw

CRIMINAL COSTS:
SHERIFF'S MILEAGE:
SCHOOLS:
ENLARGED DISTRICTS:
ELECTION OF DIRECTORS:
PRINTED BALLOTS REQUIRED:

1. When sheriff serves criminal warrant while driving on official business not connected with case, and claims mileage under provisions of \$ 57.300, RSMo 1949; if warrant served more than five miles from place of trial, he is entitled to mileage at ten cents per mile for each mile

actually traveled, under said section. 2 (a). Examination and certification of criminal fee bills under provisions of \$ 550.190, RSMo 1949, a discretionary duty of circuit judge. He is required to examine and certify the sheriff's mileage when court costs are paid by the state. No statutory duty of judge to examine and certify mileage of sheriff of third and fourth class counties when criminal costs to be paid by county and sheriff's mileage exempt under provisions of \$57.410, RSMo 1949.

2(b). Examination and certification of criminal fee bills of cases finally determined in magistrate court, a discretionary duty of magistrate. No statutory duty of magistrate to examine and certify mileage of sheriff of third or fourth class county when criminal costs to be paid by county and sheriff's mileage exempt under provisions of \$ 57.410, RSMo 1949.

3. In election of directors of enlarged school district, printed ballots are necessary to valid election under provisions of \$ 165.687, 111.400, RSMo 1949, and 165.330, RSMo Cum. Supp. 1955.

FILED

33

June 17, 1957

Honorable J. Allen Gibson
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Mr. Gibson:

This department is in receipt of your recent request for a legal opinion which reads as follows:

"Will you please give me an opinion on the following questions.

"(1) Should the Magistrate allow the Sheriff \$2.00 for the warrant and plea where the defendant has been summoned in by the Highway Patrol or the Game Warden?

"(2) Should the Sheriff's office be allowed mileage where they summons a man in when they have not gone on a special call but issued the summons while cruising the highways?

"(3) Is the allowing or disallowing of mileage and the amount thereof discretionary with the Judge?

"(4) In the elections of school boards for reorganized school districts and members of special road districts boards should there be printed ballots? If there is not is the election valid?"

The first part of the first inquiry refers to an instance when a defendant is arrested on a criminal warrant by a member of the State Highway patrol, and asks if the magistrate should allow the sheriff \$2.00 for the warrant and plea.

Honorable J. Allen Gibson

An opinion of this department rendered to Honorable Cline C. Herren, Judge and ex-officio Magistrate of Webster County on August 13, 1947, concluded that sheriffs are not entitled to fees for arrests made by the State Highway Patrol, but may collect a fee for trial, or confession and must turn same into general revenue. A copy of said opinion is enclosed as it is believed to fully answer the first part of the first inquiry.

The Second part of the first inquiry asks if the magistrate should allow the sheriff \$2.00 for the warrant and plea when the defendant was arrested by a Game warden.

In an opinion of this department rendered to Honorable H. A. Kelso, Judge of the Magistrate Court of Vernon County, on October 24, 1950, it was concluded that the sheriff is entitled to a fee of \$1.00 upon arrest by a conservation agent for a violation of the Wildlife Code. A copy of said opinion is enclosed, as it is believed to fully answer the second part of the first inquiry.

In the first inquiry the word "summoned" is used in referring to the arrest of a defendant by the officers, on a warrant issued by a magistrate court. The second inquiry refers to mileage of the sheriff's office "where they summons a man in when they have not gone on a special call but issued the summons while cruising the highways." The meaning intended to be given this statement is not clear to us.

In view of the use of the word "summoned" as used in the first inquiry, it is assumed the writer intended to use the word "summons" in the second inquiry in the same sense and to refer to a factual situation in which the sheriff or his deputy or deputies arrest a person on a criminal warrant issued by a magistrate court and when the officers arrested the defendant under authority of the warrant "while cruising the highways." The meaning of the words "while cruising the highways" is not indicated and we are at a loss to understand the exact meaning intended to be given such words, since no Missouri statutes define such terms or impose a duty of this nature upon the sheriff or his deputies. For the purpose of our discussion we will assume said terms were meant to refer to a situation in which the sheriff and/or his deputies are traveling on the public highways on some kind of official business at the time they were given a warrant for the arrest of the defendant, and that whatever such official business was, it had no connection with the case pending in magistrate court in which the warrant was issued. Your letter of May 28, 1957, in attempting to clarify the second inquiry, states that the mileage referred to in the question is that of the sheriff authorized by

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Section 57.300, RSMo 1949, and the answer to the second question will be answered on this basis.

Section 57.300, RSMo 1949, fixes the mileage sheriffs or other officers are entitled to receive for serving process in criminal cases. Said Section reads as follows:

"Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held; provided, that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

While the section does not specifically mention or refer to the fees for serving warrants in criminal cases, it is believed the legislative intent was that officers should receive mileage for serving criminal warrants at the rates specified therein.

The section does provide that the officer shall be entitled to a fee of ten cents per mile for each mile actually traveled in serving a writ in a criminal case when served more than five miles from the place where the court is held. Of course, if the officer had different kinds of writs or more than one writ of the same kind to serve in the same case, then he could not be allowed mileage from the place of trial on each writ, but could be allowed mileage only for one trip to serve all such writs in the same case.

Therefore, our answer to the second inquiry is in the affirmative.

The third inquiry of the opinion request asks "Is the allowing or disallowing of mileage and the amount thereof discretionary with the Judge?"

It is assumed the mileage referred to in the third inquiry is the same mileage of the sheriff mentioned in the second inquiry.

Section 550.140, RSMo 1949, imposes a duty on the clerk of the court in which any criminal case has been determined or continued generally to prepare a fee bill, and if the state or county is liable for the cost, to deliver the fee bill to the prosecuting attorney. Said section reads:

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"The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this chapter for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

Section 550.240, RSMo Cum. Supp. 1955, provides what procedure shall be followed when a criminal case has been finally determined in magistrate court, and in preparing a fee bill of the costs, or a criminal case has been finally determined and the case, together with a fee bill and all papers are certified to the circuit court. Said section reads as follows:

"In all criminal cases which have been finally determined in magistrate court in which the county shall be liable for any costs incurred therein, the clerk of said court shall certify a complete itemized fee bill thereof to the county court for payment, which fee bill shall be examined and audited by the prosecuting attorney and the magistrate judge. Whenever the state shall be liable under any law for costs incurred in any examination of a felony before any magistrate, or in any misdemeanor case which is not finally determined in the magistrate court, the magistrate clerk shall make out, certify and return to the clerk of the circuit court of the county a complete fee bill, specifying each item of service and the fee therefor, together with all the paper and docket entries in the case. The clerk of the circuit court shall thereupon make out a fee bill of all such costs which are legally chargeable against the state or county, which shall be examined by the prosecuting attorney. All such fee bills shall thereafter be proceeded with in all respects as in the case of fee bills for costs incurred in the circuit court."

This section applies when (1) a criminal case has been finally determined in magistrate court and the county is

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liable for the court costs; (2) when the state shall be liable for the court costs incurred in any felony examination, or a misdemeanor case is not finally determined in magistrate court. In either instance an itemized fee bill of all court costs shall be prepared by the clerk of the magistrate court.

In the first class of cases the complete itemized fee bill shall be certified to the county court for payment after it has been examined and audited by the prosecuting attorney and magistrate judge.

In the second class of cases the magistrate clerk shall prepare a complete itemized fee bill which shall be certified to the clerk of the circuit court of the county, together with all papers and docket entries in the case. Thereafter, the circuit clerk shall prepare a fee bill of all costs in the case for which the state or county is legally chargeable. All such fee bills shall then be proceeded with as in the case of fee bills for costs incurred in circuit court.

Section 550.190, RSMo 1949, provides for the examination and certification of fee bills in criminal cases in circuit court and reads:

"The prosecuting attorney shall strictly examine each bill of costs which shall be delivered to him, as provided in Section 550.140, for allowance against the state or county, and shall ascertain as far as possible whether the services have been rendered for which the charges are made, and whether the fees charged are expressly given by law for such services, or whether greater charges are made than the law authorizes. If the fee bill has been made out according to law, or if not after correcting all errors therein, he shall report the same to the judge of the court, either in term or in vacation, and if the same appears to be formal and correct, the judge and prosecuting attorney shall certify to the state comptroller, or clerk of the county court, accordingly as the state or county is liable, the amount of costs due by the state or county on the fee bill, and deliver the same to the clerk who made it out, to be collected without delay, and paid over to those entitled to the fees allowed."

While Section 550.190, supra, requires the prosecuting attorney and circuit judge to examine the fee bill and determine, as far as possible, if the services rendered and charged for therein are authorized by the statutes, and if the fee bill has been made out according to law. All errors must be

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corrected and the fee bill appear to be correct and formal before the prosecuting attorney and circuit judge sign and certify it to the state comptroller or to the county for payment, as the case may be.

With reference to the sheriff's mileage in those cases when the costs shall be paid by the state, it is the duty of the circuit judge to strictly examine and certify such criminal costs to the state comptroller for payment in the manner discussed in the preceding paragraph. However, in those criminal cases in which the costs shall be paid by the county, a different procedure is to be followed with reference to the sheriff's mileage.

The provisions of Section 57.410, RSMo 1949, require the sheriff of a third or fourth class county to charge and collect every fee accruing to his office, except those criminal fees chargeable to the county. This section has particular significance in the present inquiry since your county of Stone is one of the fourth class and said section must be considered in arriving at the correct answer to the third inquiry.

The section reads as follows:

"In all counties of the third and fourth classes, the sheriff shall charge and collect for and on behalf of the county every fee accruing to his office which arises out of his duties in connection with the investigation, arrest, prosecution, care, commitment and transportation of persons accused of or convicted of a criminal offense, except such criminal fees as are chargeable to the county. The sheriff may retain all fees collected by him in civil matters."

From this section it appears that the sheriff of a third or fourth class county is not required to charge for mileage or other fees in criminal cases when the county shall pay the costs. It is believed the sheriff's mileage shown in the fee bill, along with other court costs of the sheriff, that Section 550.190, supra, nor any other section of the statutes impose the duty upon the circuit judge to examine and certify such mileage or other fees of the sheriff to the county court for payment.

Section 550.240, supra, requires a fee bill to be made, which shall be examined and certified to by the prosecuting attorney and magistrate judge in all criminal cases finally determined in magistrate court, when the county shall pay the court costs.

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For the same reasons given above, it is believed that all criminal cases finally determined in magistrate court, and also in view of the provisions of Section 57. 410, supra, the magistrate judge is not required to examine and certify to the sheriff's mileage or other fees, i.e., those of a sheriff of a third or fourth class county, to the county court for payment.

The third inquiry also involves the proposition as to whether or not the duty of the circuit or magistrate judge in examining and certifying fee bills of criminal cases for payment is discretionary or ministerial.

In the case of State ex rel, Houser v. Oliver 116 Mo. at l.c. 188 it was held that a criminal court judge, in certifying criminal cost fee bills to the state auditor for payment was not performing a ministerial, but a discretionary duty, and mandamus was not a proper remedy to control his actions in such matter. At l.c. 194 the court said:

"The matter in issue was one of fact, whether it were true, as stated in the return, that defendant allowed in the fee bill certified to the state auditor, 'fees for at least three witnesses to establish any one fact in said cause,' If the determination of that question called for the exercise of discretionary powers and judgment, then the action of defendant cannot be controlled by mandamus. Unless such powers were intended to be conferred upon the judge of the criminal court, it is difficult to see any good reason why the supervision of the fee bill made out by the clerk should have been given to and so positively enjoined upon the judge and prosecuting attorney. The mere ministerial act of calculating the amount of the mileage and per diem of a witness at rates fixed by the statute could have been done as well by the clerk. That is not all that is required by this statute. There must be a determination of what issues of fact were involved in the trial and the number of witnesses necessary, not exceeding three, to each fact to properly present those issues to the jury. The statute does not mean that

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the number of independent facts must be ascertained and three witnesses allowed to each fact, though one or more witnesses might testify to a number of them. * * * To avoid the allowance of fees for fifteen witnesses, when three were all that should have been paid by the state, was the purpose and intent of the statute. If no discretion was allowed these auditing officers, the statute would be wholly nugatory."

In view of the foregoing, and in answer to the third inquiry, it is our thought that in examining and certifying fee bills under the provisions of Section 550.190, supra, the circuit judge may exercise discretion and approve all costs found due the claimant which are in accordance with the applicable statutes. The judge should disapprove all other costs shown in the fee bill. In those criminal cases in which the state shall pay the costs, he shall strictly examine the fee bill and determine, insofar as possible, if the services rendered and charged for, including the sheriff's mileage, are authorized by the statutes, and if the fee bill has been made out according to law. All errors appearing therein must be corrected before he signs and certifies it to the state for payment. It is further believed that under the provisions of Section 57.410, supra, the circuit judge is not required to examine and certify the mileage of a sheriff of a third or fourth class county in a criminal fee bill in those instances when the county shall pay the court costs.

In criminal cases finally determined in magistrate court under the provisions of Section 550.240, supra, and also Section 57.410, supra, when the court costs shall be paid by the county the magistrate is not required to examine and certify the sheriff's mileage to the county court for payment.

The fourth inquiry of the opinion request reads:

"(4) In the elections of school boards for reorganized school districts and members of special road districts boards should there be printed ballots? If there is not is the election valid?"

While this inquiry does not so state, it is assumed to refer to the election of directors of an enlarged school

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district under statutory provisions relating to the reorganization of school districts.

Section 165.687, RSMo 1949, provides for the election of six directors in an enlarged district and reads as follows:

"If the proposal to form such enlarged district has received a majority of the votes cast on such proposition the county board of education shall order an election in such enlarged district, at a time and place or places to be fixed by the county board of education, not more than thirty days after the date of the election when such enlarged district was formed, for the purposes of electing six directors in such enlarged district. The election shall be conducted in the manner as provided by section 165.330. Until such time as a majority of the district board members of the enlarged district are elected and qualified, the county board of education shall perform such duties with respect to conducting the election as would be performed by the district board of education were it in existence, but the costs of election shall be paid from the incidental fund of the enlarged district. Two directors shall be elected to serve until the next annual school election, two to serve until the second annual school election, and two to serve until the third annual school election. After the expiration of the initial terms, members elected shall serve for three years. The directors above provided shall be governed by the laws applicable to six-director school districts."

It is noted that said section states that the election shall be conducted in the manner provided by Section 165.330, RSMo 1949. Section 165.330 has been repealed and a new section bearing the same number in RSMo Cumulative Supplement 1955 has been enacted and reads, in part, as follows:

"1. The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tuesday in April of each year, and at such convenient place or places within the district as

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the board may designate, beginning at seven o'clock a.m. and closing at six o'clock p.m. of said day. The board shall appoint three judges of election for each voting place, and said judges shall appoint two clerks; said judges and clerks shall be sworn and the election otherwise conducted in the same manner as the elections for state and county officers and the result thereof certified by the judges and clerks to the secretary of the board of education, who shall record the same, and, by order of said board, shall issue certificates of election to the persons entitled thereto; and the results of all other propositions submitted must be reported to the secretary of the board, and by him duly entered upon the district records.

"2. All propositions submitted at said annual meeting may be voted for upon one and the same ballot, and necessary poll books shall be made out and furnished by the secretary of the board; provided, that in all cities and towns having a population exceeding two thousand and not exceeding one hundred thousand inhabitants, in counties containing not less than two hundred thousand nor more than four hundred thousand inhabitants according to the last national census, said elections may at the option of the board be held at the same time and places as the election for municipal officers and in all cities and towns having a population exceeding two thousand and not exceeding one hundred thousand inhabitants in other counties, said elections shall be held at the same time and places as the election for municipal officers, and the judges and clerks of such municipal election shall act as judges and clerks of said school election, but the ballots for said school election shall be upon separate pieces of paper and deposited in a separate ballot box kept for that purpose."

The section provides that the voters "shall vote by ballot upon all questions provided by law for submission at the annual school meetings, * * *. All propositions submitted at said annual meeting may be voted for upon one and the same ballot, * * *." The section further provides that in cities and towns having certain designated populations, the election may, at the option of the board, be held at the same time and place as the election for municipal officers with the same judges and clerks for both elections. The ballots for the

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school election shall be upon separate pieces of paper and deposited in separate ballot boxes.

From the provisions of said sections, it is obvious that the election of directors of an enlarged school district and directors of a city, town or consolidated district shall be by ballot, but neither section states that the names of the candidates shall appear on a printed ballot. However, the last quoted section does state that the election shall be conducted in the same manner as elections for state and county officers.

Section 111.400, RSMo 1949, requires all ballots cast in elections for such officers within the state to be printed and distributed at public expense. In view of the provisions of this section, printed ballots shall be used in the election of directors of an enlarged school district, but neither this section nor any other sections define the term "printed ballot." In this connection we call attention to the case of State ex rel. Page et al. v. Vossbrinck et al., 257 S.W. 2d 208.

This was a mandamus proceeding brought for the purpose of challenging certification of the results of a special election for consolidating two school districts into an enlarged district. The ballots used in the election were questioned because they had been prepared upon a duplicating machine from an original typewritten form, rather than having been prepared upon a printing press. The court held that printed ballots were required in elections of this nature and the ballots in question were "printed ballots" within the meaning of the statute. At 1.c. 210, the court said:

"While Section 165.680 prescribes the form of the ballots to be used at an election on a proposed enlarged district, it contains no direction whatever as to the mechanics of their preparation. It does provide, however, that such an election shall be conducted in the same manner as elections for state and county officers; and when we turn to the statutes relating to the conduct of election, we find the requirement in Section 111.400 RSMo 1949, V.A.M.S., that 'All ballots cast in elections for public officers within this state shall be printed.' Even though it is true that Chapter 111 by its own terms excludes its application to school elections generally, Section 111.010 RSMo 1949, V.A.M.S., its application to an election upon a proposed

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enlarged district is specially authorized by the reference in Section 165.680, so that for the purposes of this case it would seem that relators are at least correct in their insistence upon the necessity for printed ballots.

"But even though it was obligatory that printed ballots should have been employed, it does not follow that the ballots prepared by the duplicating process failed to satisfy such requirement. It is a well known fact that the word 'printed' has a variety of meanings depending upon the connection in which it is used. In its broadest sense the term 'printed' is used in contradistinction to something prepared in script. Having due regard for the purpose to be served, we are convinced that the Legislature, in laying down the requirement that ballots should be printed, was not primarily concerned with the precise mechanical process by which such result should be accomplished, but rather with the fact that the letters, figures, and symbols appearing on the ballots should be of the character of those that are commonly and ordinarily referred to as print. In this case there is no contention that the ballots in dispute did not fully conform in language, symbols, and arrangement with those which had been prepared and supplied by Vossbrinck. Instead the only criticism is that they had been prepared upon a duplicating machine from an initial typewritten form rather than by having been run through a printing press with the impression made upon the paper by contact with inked type. The ballots in question were 'printed' within the meaning of the statute, and there would be no basis in law for directing that they be rejected in determining the results of the election at which such ballots were cast."

From the foregoing it appears that in all elections for directors of enlarged districts held in accordance with Sections 165.687, RSMo 1949, 165.330, RSMo Cum. Supp. 1955 and 111.400, RSMo 1949, printed ballots shall be used, but the meaning of the word "printed", as used in Section 111.400, supra, does

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not require the ballots to be prepared only upon a printing press. As indicated by the court in *State v. Vossbrinck*, supra, the ballots may be prepared by use of some other mechanical device than a printing press and they will still be printed ballots within the meaning of Section 111.400, supra.

In answer to the first part of the fourth inquiry, it is our thought that printed ballots shall be used in all elections for directors of enlarged school districts in order to render such elections valid.

The latter part of the fourth inquiry, in effect, asks if printed ballots shall be used in the election of members of the board of commissioners of a special road district, and in the event printed ballots are not used, if the election is valid.

The inquiry fails to indicate the kind of special road district or county involved, that is, it fails to state if the inquiry was intended to refer to a special eight-mile road district or a special benefit assessment district of a nontownship organization county, as referred to in Sections 233.010 to 233.165, and 233.170 to 233.315, RSMo 1949, respectively, or if the reference was to special benefit assessment districts of township organization counties organized under the provisions of Sections 233.320 to 233.470, RSMo 1949.

Inasmuch as your county of Stone is a nontownship organization county, it is assumed that the reference intended was to the election of road commissioners of a special benefit assessment district of a nontownship organization county.

In an opinion of this department written for Honorable William Lee Dodd, Prosecuting Attorney of Ripley County on January 16, 1950, it was concluded that the board of commissioners of a special road district organized under provisions of Article 11, Chapter 46, RSMo 1939, should determine the manner of taking, ascertaining and recording the vote in an election of a commissioner.

Article 11, Chapter 46, RSMo 1939, has been retained in its entirety, as Sections 233.170 to 233.315 of RSMo 1949, dealing with special benefit assessment road districts in non-township organization counties. Section 8712, RSMo 1939, quoted in the opinion, is now Section 233.180, RSMo 1949. A copy of said opinion is enclosed as it is believed to fully answer the latter part of the fourth inquiry regarding the election of commissioners of a special road district.

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CONCLUSION

It is therefore the opinion of this department that:

1. When a sheriff serves a warrant on a defendant in a criminal case while traveling on other official business not connected with such criminal case, and if said warrant is served more than five miles from the place where the court is held, and mileage is claimed under the provisions of Section 57.300, RSMo 1949, the sheriff shall be entitled to mileage at the rate of ten cents for each mile actually traveled, as provided by said section.

2. (a) The examination and certification of fee bills of criminal cases, under the provisions of Section 550.190, RSMo 1949, is a discretionary duty of the circuit judge. He is required to certify to the sheriff's mileage in those cases, the costs of which shall be paid by the State of Missouri. There is no statutory duty upon the judge to examine and certify to the mileage of a sheriff of a third or fourth class county in those criminal cases in which the county shall pay the court costs, and the sheriff's mileage is exempt from payment under the provisions of Section 57.410, RSMo 1949.

(b) The examination and certification of fee bills of criminal cases finally determined in magistrate court, under the provisions of Section 550.190, RSMo Cum. Supp. 1955, is a discretionary duty of the magistrate judge. No statutory duty is imposed upon the judge to examine and certify to the mileage of a sheriff of a third or fourth class county in a criminal case when the costs shall be paid by the county, and the sheriff's mileage is exempt from payment under the provisions of Section 57.410, RSMo 1949.

3. In the election of directors of an enlarged school district printed ballots shall be used, and are necessary to a valid election. Sections 165.687, 111.400, RSMo 1949, and 165.330, RSMo Cum. Supp. 1955, shall be followed in holding such election.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

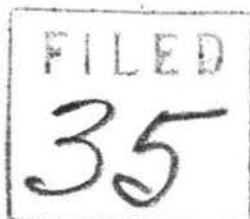
Yours very truly,

John M. Dalton
Attorney General

Enclosures
PNC:db:lc:gm

CRIMINAL COSTS:
CRIMINAL LAW:
COSTS:
MOTOR VEHICLES:

The county is liable for the costs of a prosecution for failure to report a motor vehicle accident commenced under Sec. 303.370 RSMo Cum. Supp. 1955, if the defendant is found guilty and is unable to pay the costs.



February 28, 1957

Honorable Thomas D. Graham
Representative, Cole County
Capitol Building
Jefferson City, Missouri

Dear Mr. Graham:

Reference is made to your request for an official opinion, which request reads as follows:

"Sheriff Ben Markway of Cole County has posed a problem to me on which I hope you will give me an opinion.

"The venue for all of the safety responsibility claims lies in Cole County and the question is this. If a defendant is found guilty and is unable to pay the costs, either for the court or the sheriff, how can the Sheriff of Cole County collect his mileage expense and the costs?

"I should appreciate an opinion on this at the first opportunity, and thank you very much for your kindness."

You inquire as to how the Sheriff of Cole County can collect his mileage expenses and costs, in the event a defendant is found guilty of failing to file a report under the provisions of Section 303.370 RSMo Cum. Supp. 1955, and is unable to pay the costs.

Section 303.370 RSMo Cum. Supp. 1955, makes the failure to report an accident punishable by a fine not in excess of five hundred dollars. As previously pointed out in an opinion of this office to James T. Riley, Prosecuting Attorney of Cole County, under date of January 21, 1957, a copy of which is enclosed herewith, it is difficult to determine whether said section constitutes a "fine", within the meaning of Section 550.050 RSMo 1949, or a misdemeanor. Likewise, in this opinion we do not feel that a

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determination of the question is necessary, for the reason that in either event the ultimate conclusion would be the same. Section 550.050, provides in part as follows:

"* * * if he is convicted, and unable to pay the costs, the county shall pay all the costs, except such as were incurred on the part of the defendant."

Section 550.030, relating to misdemeanors, provides as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Both of the above-noted statutory provisions provide that the county shall be liable for the costs (except costs incurred on the part of the defendant), where a defendant is found guilty and is unable to pay the costs.

CONCLUSION

Therefore, it is the opinion of this office that the county is liable for the costs of a prosecution for failure to report a motor vehicle accident commenced under Section 303.370 RSMo Cum. Supp. 1955, if the defendant is found guilty and is unable to pay the costs.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Donal D. Guffey.

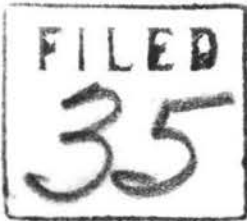
Very truly yours,

John M. Dalton
Attorney General

DDG:ld

enc. (1)

TAXATION: Residential property at 127 East Circle Drive, Jefferson City, Missouri, owned by Missouri Council of Churches, exempt from taxation under Article X, Section 6, of Missouri's Constitution of 1945, and Section 137 (6) RSMo 1949.



April 29, 1957

Honorable Thomas D. Graham
Member, Missouri House of Representatives
512 Central Trust Building
Jefferson City, Missouri

Dear Mr. Graham:

This opinion is in answer to your request reading, in part, as follows:

"I enclose herewith a letter from the Missouri Council of Churches, Mr. A. Greig Ritchie, Executive Director, which I believe is self-explanatory.

"I should like to have an opinion from your office as to whether or not property such as that owned by the Missouri Council of Churches and other church organizations, and used as a parsonage by the executive director and other ministerial employees, is subject to real property taxes under the laws of the State of Missouri; or, whether or not such property comes under Section 137.100, RSMo. 1949, and is exempt."

Essential facts to be considered in this opinion may be briefly stated, as gained from your letter of inquiry, the communication of April 12, 1957 addressed to you by the Executive Director of the Missouri Council of Churches, and from investigations made by this office.

In February, 1952 the Missouri Council of Churches purchased a residential property to be used as a manse at 127 East Circle Drive, Jefferson City, Missouri. In 1955 and 1956 the property was placed on the tax rolls of Cole County, and efforts made to have such tax abated on the ground that the

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property is exempt from taxation have not resulted in such abatement. The Missouri Council of Churches desires to sell the property but the taxes levied and unpaid at this date have forestalled a sale. At no time since acquisition of the property has it been held as commercial property, or been used as income producing property by the Missouri Council of Churches.

Of legal necessity this opinion is directed to the particular facts mentioned herein. In *Midwest Bible and Missionary Institute v. Sestric*, 260 S.W. (2d) 25, 364 Mo. 167, 1.c. 174, we find the following:

"And it is of course true that each tax exemption case is 'peculiarly one which must be decided upon its own facts.' Taxation is the rule. Exemption therefrom is the exception. Claims for exemption are not favored in the law."

The Missouri Council of Churches was incorporated in April, 1947 by pro forma circuit court decree in St. Louis County, Missouri. The following language from Article II of the original Articles of Agreement adopted by the corporation, and now on file in the office of Missouri's Secretary of State, reflect the general purposes and powers of the corporation necessary for consideration in this opinion:

"The purposes and objects of this Association shall be to promote and extend the Christian religion in the State of Missouri by providing an interdenominational agency for cooperation in Christian education, missions, comity, social relations and other Christian activities, and to function as the accredited agency of the International Council of Religious Education; * * * The Association shall have power to acquire and hold property of every kind, * * *."

Purposes and powers of the corporation, as briefly recited above, disclose the special character of the corporation, and the decree of incorporation found that the objects and purposes set out in the original Articles of Agreement brought the incorporators within the framework of Chapter 33, Article 10, R.S.Mo. 1939 (Chapter 352 RSMo 1949) particularly applicable to incorporation of benevolent, religious and educational associations.

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Article 10, Section 6 of the Constitution of Missouri provides:

"Exemptions from taxation.--All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Section 137.100 RSMo 1949 provides, in part:

"The following subjects shall be exempt from taxation for state, county or local purposes:

* * * * *

"(6) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational or charitable purposes."

The above quoted constitutional and statutory provisions were reviewed by the Missouri Supreme Court as late as July 11,

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1955 in the case of St. Louis Gospel Center v. Prose, 280 S.W. (2d) 827. In such case the Court denied the exemption from taxation because the property involved was occupied by a tenant, Miss Hobbs. In ruling the question the Court spoke as follows at 280 S.W. (2d) 827, l.c. 830:

"The relation which plaintiff and Miss Hobbs bore to each other was that of landlord and tenant, and the small apartment occupied by her to the extent of its area or space, during her tenure, interfered with and interrupted the exclusive use of the property for religious, charitable and educational purposes. Her occupation as a mere tenant in no way furthered, fulfilled, rounded out or dovetailed into the purposes of plaintiff or of Midwest as religious, charitable or educational organizations. The rooms occupied by her as a tenant were availed of by plaintiff as a source of income, or profit. Actually and legally the relationship was purely a commercial one. Because of the nature of her use and occupancy, it could not be reasonably said the building was used exclusively for religious, charitable or educational purposes, and so the property did not come within the purview of the tax-exempting constitutional and statutory provisions, construing them from a strict though reasonable standpoint."

It is the view of this office that the converse of the rule stated and applied in the case of St. Louis Gospel Center v. Prose, cited supra, should be applied to the facts being considered in this opinion touching the residence property at 127 East Circle Drive, Jefferson City, Missouri owned by the Missouri Council of Churches. It must be reasonably concluded that the ownership, use and occupancy of the property for non-commercial use "furthered, fulfilled, rounded out or dovetailed into the purposes" of the Missouri Council of Churches as such language was used in the decision cited above, and such property is exempt from taxation under the constitutional and statutory provisions considered.

CONCLUSION

It is the opinion of this office that the residential

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property at 127 East Circle Drive, Jefferson City, Missouri owned by the Missouri Council of Churches, and not used for commercial purposes, is exempt from taxation under Article X, Section 6, of Missouri's Constitution of 1945, and Section 137 (6) RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:hw

"CONVICTED" DEFINED:
LIQUOR LAW:

The word "convicted" as used in numbered paragraph 2 of Section 312.510, RSMo 1949, includes within its meaning a plea of guilty, as does a trial before the court which results in a finding of guilt.

June 17, 1957



Honorable Peter J. Grewach
Prosecuting Attorney
Lincoln County
Troy, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Subparagraph 2 of Section 312.510 of the Revised Statutes calls for a revocation of a license upon conviction of any offenses outlined in the Chapter. Subparagraph 3 of the same section sets forth the procedure to be followed if by final judgment the permittee is acquitted of the charge.

"It appears to me that it was the intent of the legislature that the word conviction used in Paragraph 2 should be construed as a finding of guilt by the jury.

"Will you please furnish your opinion of the meaning of this terminology."

The single point which is raised in your above request, as we view it, is whether the word "convicted" as used in paragraph 2 of Section 312.510 of the Revised Statutes of Missouri, 1949, means conviction by a jury only or whether it also embraces a plea of guilty, and a judgment of conviction by the court following such plea.

In this regard we direct your attention to the case of *Wilson v. Burke*, 202 S.W. 2d 876. At 1.c. 878 of its opinion, the Missouri Supreme Court stated:

"The contentions made by respondent and the discussion in the brief and in the cases cited by respondent respecting the historicity and limitations of the nolo contendere plea are interesting. But they cannot avail respondent

here. The statute, Section 4906, stands between respondent and the license for which he applied. The legislature has the right to determine what may deprive an applicant of the right to receive a license to sell liquor. Such right is one of the prerogatives of the legislative branch of the government. The legislature has the right to ignore the manner in which the conviction was reached, whether upon trial, upon plea of guilty or plea of nolo contendere. Upon this very point this Court has heretofore ruled in *Neibling v. Terry*, 352 Mo. 396, 177 S.W. 2d 502, 503, 152 A.L.R. 249, wherein, in a disbarment action against Terry, it was contended that because Terry had pleaded nolo contendere to a charge of using the mails to defraud that the judgment of conviction upon such plea could not be used as the basis of disbarment action there upon appeal. In that case the statute, R.S.Mo. 1939, Sec. 13333, Mo.R.S.A., stated that 'a conviction for any criminal offense involving moral turpitude' authorized disbarment. The decision of the question before us in that case turned on the effect of a nolo contendere plea upon which the judgment of conviction was there based. In ruling that 'Terry's conviction on his plea of nolo contendere' was 'sufficient to authorize his disbarment under our statute', we discussed the meaning of the word 'convicted' as used in a disability statute, and said, in part (352 Mo. loc. cit. 398, 177 S.W. 2d loc. cit. 504, 152 A.L.R. 249): 'By statute, in certain instances, a judgment of conviction has been given force because of the fact of its rendition. In such instances the judgment of conviction is made a basis for enforcing a statutory disability. Such statutes in no wise authorize the use of a conviction as an admission to be used to establish liability in a civil suit. Nor do the statutes make any distinction in convictions according to the nature of the plea resulting in such convictions. Nor is there any logical reason for a distinction. For statutory purposes a conviction on a plea of not guilty carries the same force as one entered on a plea of guilty.' We squarely ruled in Terry's case, as we do here, that the statute, being a disability statute, and failing to note any distinction or exceptions in judgments of conviction 'according to the nature of the plea resulting in such convictions' that we are without any au-

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thority to write any exception whatever into the statute. Such is a legislative function. The legislature wrote the statute. Our function is limited to its interpretation. We can write neither the statute nor our philosophy with respect to how we may believe the legislature should have written the statute. State v. Kennedy, 343 Mo. 786, 794, 123 S.W. 2d 118. * * *."

In the case of Meyer v. Missouri Real Estate Commission, 183 S.W. 2d 342, at l.c. 345, the Kansas City Court of Appeals stated:

"We are of the opinion that the word 'conviction', as used in the Missouri Real Estate Commission Act, should be taken in its most comprehensive sense, that is, to include the judgment of the court upon a verdict or confession of guilt. * * *."

An almost unlimited number of other cases of the same import as the two Missouri cases discussed above, from foreign jurisdictions, could be adduced in support of the Missouri law stated above. We note the following: State v. Staples, 124 Atl. 2d 187; Huff v. Anderson, 90 S.E. 2d 329; State v. Compton, 100 Atl. 2d 304; Bubar v. Dizdar, 60 N.W. 2d 77; People v. Dail, 140 Pac. 2d 828. We will further state that trial before the court, resulting in a finding of guilt, is also a "conviction" within the meaning of Section 312.510.

CONCLUSION

It is the opinion of this department that the word "convicted" as used in numbered paragraph 2 of Section 312.510, RSMo 1949, includes within its meaning a plea of guilty, as does a trial before the court which results in a finding of guilt.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW/lc/b1

MOTOR VEHICLES:
OPERATOR'S AND
CHAUFFEUR'S LICENSES:
CRIMINAL LAW:

Subsection 4 of Section 302.010 is constitutional. Driver's license may be suspended for convictions in proper court while convictions may be on appeal.



October 21, 1957

*Memo Copies
in Vault*

Honorable Leslie R. Groves
State Representative
521 Sunset Drive
Macon, Missouri

Dear Mr. Groves:

This is in response to your request for an opinion dated September 11, 1957, which reads in part as follows:

"I hereby request an opinion from you as to whether or not Section 302.010(4) is constitutional. I would also like to know whether or not that statute is rendered ineffective by its apparent inconsistency in that it defines 'conviction' as any conviction 'whether appealed or not' but then goes on to say that if the conviction is appealed and reversed or set aside it shall not be considered a 'conviction'."

In accordance with Section 302.010, enacted by the 68th General Assembly in 1955, L. 1955, p. 621, the present definition of "conviction" in the Missouri Driver's License Law is as follows:

"(4) 'Conviction', any conviction whether appealed or not, except that if any conviction is appealed and reversed or set aside on appeal it shall not be considered a 'conviction' under this chapter; also a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction;"

Upon first consideration there may be a serious question arise in regard to the constitutionality of such a definition. This is so since it has been pointed out that this definition is the basis for the revocation of a

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driver's license under the provisions of Section 302.271, Cum. Supp. 1955. That section providing for revocation for conviction upon three charges of careless or reckless driving committed within a period of two years. In order to better understand the situation herein, it is thought best to inquire first as to whether a driver's license under the law is such a property right that it is to be protected by the due process of law provisions of the Missouri Constitution of 1945. That a license to operate a motor vehicle upon the state highways is a privilege and not a property right or a personal right, has been decided by the majority of the appellate courts of the country. It is thought that the Missouri Law is as stated in the case of Schwaller v. May, 234 Mo. App. 185, 115 S.W. 2d 207 at l.c. 209. In that case, in regard to such license, it was stated by the St. Louis Court of appeals as follows:

"To the contrary, it amounted to no more than a personal privilege extended to him to be exercised subject to the restrictions placed upon its use by the sovereign power of its creation, which means that he took it subject to the right of suspension or revocation on such conditions as the ordinance imposes."

In the case of State v. Guerringer, 178 S.W. 65, 265 Mo. 408, at l.c. (S.W.) 67, it was said by the Missouri Supreme Court as follows:

"Moreover, the Constitution guarantees to defendant that he shall not be deprived of his property, or his liberty, or his life without due process of law. Section 30, art.2, Const. Mo. 1875. If he had no opportunity to file a motion for a new trial, as we must concede he did not have, but notwithstanding this his life be taken, it will have been taken without due process of law; for, while the right of appeal is not essential to due process of law (Reetz v. Michigan, 188 U.S. loc. cit. 508, 23 Sup. Ct. 390, 47 L. Ed. 563), yet, if an appeal be

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allowed to some persons, and not to all persons similarly situated, such deprivation of the right to an appeal is equivalent to the denial of due process of law, for due process of law and the equal protection of the laws are secured only 'if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government' (Duncan v. Missouri, 152 U.S. loc.cit. 382, 14 Sup. Ct. 572, 38 L.Ed. 485)."

A more recent decision on this point is contained in the case of Ex parte Carey, 267 S.W. at l.c. 807 as follows:

"In Missouri there is no constitutional right to bail after conviction; the provision guaranteeing bail, except in capital cases, relates to persons who are accused, before trial and conviction. Ex parte Heath, 227 Mo. 393, 126 S.W. 1031. Nor is there any constitutional right of appeal in this state. Such right is enjoyed solely by statute, and the privileges and immunities ancillary thereto, including stay of execution and bail pending the appeal, are likewise of statutory creation, and consequently limited to the number and kind given by statute. Ex parte Heath, supra; State v. Leonard, 250 Mo. 406, 157 S.W. 305."

It is believed from the citations above that it must be concluded that the right of appeal is not essential to due process of law; that there is no right of appeal unless it is provided for by statute. It is believed it must be considered, therefore, that the legislature can provide for the revocation of a driver's license for a conviction by a proper trial court while that conviction is on appeal to a higher court.

It is not thought that the exception as to the deprivation of the right to an appeal being discriminatory so as to be construed as a denial as a due process of law,

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as pointed out in the Guerringer case, above, could be raised here. The law treats all of those similarly situated in a like manner in regard to the revocation of drivers' licenses. It is believed that conviction in the first instance by a duly constituted, lawful court satisfies the constitutional guaranty of due process of law. Further procedure thereafter in a criminal cause must be in accordance with statute law. When the legislature has enacted a law defining the conditions under which persons will be prohibited licenses to use the state highways, it is thought that the two main tests of the constitutionality of that law are those of uniformity and of reasonableness. The reason for the new definition appears to be that where three convictions of careless or reckless driving within the prescribed period of time by trial courts are had, it is deemed evidence enough of the driving habits of an operator so convicted to cause the revocation of his driver's license. Since time for an appeal of the third, second or even the first conviction during the term could carry far beyond the allotted two-year period, it may well have been the legislative intent that this law unquestionably enacted in the furtherance of public safety was not to be nullified by even the usual necessary delay caused by the taking of an appeal. Since the reasonableness of purposes can no doubt be ably substantiated by the state, the law must be said to pass that test.

This law may be also said to add attributes of uniformity rather than to detract therefrom. "Conviction" originally meant the absolutely final conviction of the highest court that could, under the law, be reached by appeal and again meant a finding from which no appeal was taken and the time for appeal had lapsed. Such a condition meant the almost immediate revocation of some licenses and then caused escape from the effect of the law of others by reason of an appeal carrying the time of a conviction beyond the requisite two-year period. No cases seem to have been decided by other jurisdictions in regard to the fact that a conviction in the court of first instance may cause a revocation. It is indicative of the general law that in a great many states conviction is merely required to support driver's license revocation rather than final conviction. There is some authority to the effect that the word "conviction" alludes to the result obtained in a trial by the court of first instance.

In the case of Ritter v. The Democratic Press Company,

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68 Mo. 458, where the circuit court had disqualified a person offered as a witness on the ground that he had been convicted, while the conviction was on appeal, the court stated at l.c. 461:

"* * * The only question is whether Saunders, sentenced as he had been to the penitentiary, though he had appealed to this court, where the judgment was reversed, was at the time he was offered as a witness, a competent one. We think the circuit court properly excluded him. He was convicted of a crime which disqualified him as a witness, and the subsequent reversal of that judgment by this court, could not be anticipated by the circuit court."

CONCLUSION

It is, therefore, the opinion of this office that Section 302.010, subsection 4, is constitutional.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Faris.

Very truly yours,

John M. Dalton
Attorney General

JWP:db:lc

Dept. of Corrections: Amounts paid from penitentiary personal service appropriations may be credited against the amount owed by penitentiary for purchases from penitentiary farms.



May 14, 1957

Mr. C R. Hardy
Auditor
Department of Corrections
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request reads as follows:

"Under Section 41 of House Bill No. 377 of the Sixty-eighth General Assembly there was created a Division of Prison Farms, which, according to the Bill, should be operated under the established Working Capital Revolving Fund with such restrictions as were provided for Prison Industries under the same fund.

"House Bill No. 377 was signed and became a law July 14, 1955, and cash balances were transferred as required.

"Since no appropriations had been made under which the Working Capital Revolving Fund could operate, an opinion was requested of the Attorney General as to how operations might be carried on. The opinion was favorable to operations under the Penitentiary Revolving Fund appropriation, which was made prior to the enactment of House Bill No. 377.

"All classified expenditures have been paid for the factories and farms from appropriations made for the Revolving Fund, with the exceptions of a number of Farms Foremen, General Farmers, and Dairymen.

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"The original appropriation for the Revolving Fund Personal Service, which was requested for the 1955-57 budget, covered only employees for the Industries factories and was not sufficient for payment of the Farms' employees, thus making it necessary to pay Farms and Dairy employees from the Penitentiary Personal Service appropriation.

"All sales made to the Penitentiary by the Division of Farms are carried on the Working Capital Revolving Fund receivables account and paid by cash from the Penitentiary Revenue, Operations.

"Since it is evident that the actual cost of production on the farms is not fully shown, due to the fact that the Farms' employees have not been paid from the Working Capital Revolving Fund, an opinion is respectfully requested as follows:

"Would the Accounting Department of the Penitentiary be permitted to charge against the operations of the various farms and dairies such amounts as have been paid for each farm and dairy by the Penitentiary from the Penitentiary Personal Service account, and credit the receivables account held by the Working Capital Revolving Fund as due from the Penitentiary, thus reducing the amount of payments to be made to the Working Capital Revolving Fund?"

Section 216.191, RSMo, 1955 Supp., which established the Working Capital Revolving Fund for the Department of Corrections, provides, in part, as follows:

"1. The gross or total receipts and income of all industrial and farm operations of the institutions within the department of corrections shall be paid into the state treasury and credited to the 'Working Capital Revolving Fund', which is hereby created.

"2. The working capital revolving fund shall be used only for the establishment, maintenance, rehabilitation, expansion and operation of the prison industrial and farm programs and may be expended for:

Mr. C. R. Hardy

(1) The purchase of raw materials to be manufactured, processed or grown, including seed, fertilizer, farm animals and other necessary adjuncts to successful farm operation;

(2) The purchase, repair and replacement of machinery and equipment;

(3) The erection of new buildings and the repair and improvements of buildings used in such industrial or farm operations;

(4) The payment of inmate labor as provided in section 216.340; and

(5) All other necessary expenses and costs included in the manufacturing, growing, processing, handling and marketing of articles produced and in the operation and administration of the industrial and farm programs of the division.

"3. The divisions of prison industries and prison farms shall, on or before the fifteenth day of each month, make and enter in proper account books for each industry or farm operation a full and accurate account of all moneys received and expended during the preceding month, on what account received or expended, and shall keep proper vouchers therefor, and shall prepare statements for the director of the department of corrections of each industry and farm operation conducted by the division which shall accurately reflect the financial condition and show the profit or loss of each industry and farm operation for the preceding month. At the end of each fiscal year, the divisions shall prepare statements, and submit them to the director of the department, of the financial condition of each industry and farm operation showing the capital assets, current assets including inventory of raw materials, supplies and finished and unfinished products, the amount of sales of articles manufactured, processed

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or grown, the liabilities, including the amount of depreciation charged off, and the operating costs, including the amount actually paid for inmate labor and the profit or loss accrued to each operation. Any profit or surplus earned shall remain in the working capital revolving fund and shall be paid out only as provided by law. Such information shall be for the use of the director and for inclusion in his report to the governor and general assembly as provided in section 216.080."

The above statutory provision clearly indicates an intention on the part of the General Assembly to make the farm and industrial operations at the state penal institutions self-sustaining operations, with the payment of all expenses of such operations from the proceeds thereof. This appears particularly from the fifth subparagraph of Subsection 2, above quoted, wherein the Legislature provided for the payment of administration of the industrial and farm programs of the division from the Working Capital Revolving Fund. This also appears in the third subsection, in which the Legislature has required that the accounts be kept in order to "accurately reflect the financial condition and show the profit or loss of each industry and farm operation." Obviously, if a portion of the cost of the farm operation is being paid other than from the Working Capital Revolving Fund, as is presently the situation, there is no true reflection of the profit and loss from the operation of the farms.

The proposed accounting procedure, referred to in your opinion request, would result in the Working Capital Revolving Fund's being eventually charged with the expenditures presently made from the personal service appropriations for the State Penitentiary and would, in turn, bring about a true picture of the profit or loss from the operation of the farms, a situation which does not presently exist.

Therefore, it appears to us that the proposed accounting procedures would be wholly in accord with the object of the Legislature in establishing the Working Capital Revolving Fund and would more accurately reflect the true picture of the operation of the farms. We find nothing in the law which prohibits the procedure which you propose, and therefore we are of the opinion that the charges to which you have referred would be authorized.

Mr. C. R. Hardy

CONCLUSION

Therefore, it is the opinion of this office that the Accounting Department of the Missouri State Penitentiary may charge against the operations of the various farms and dairies such amounts as have been paid for each farm and dairy by the penitentiary from the penitentiary's personal service account and credit the receivables account held by the Working Capital Revolving Fund as due from the penitentiary, thereby reducing the balance owed by the penitentiary for purchases from prison farms and dairies.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

BOARDING HOMES FOR CHILDREN:

SENATE BILL NO. 41:

The home for children, known as the Convent of the Good Shepherd, located at 3801 Gravois Avenue, St. Louis, Missouri, is not subject to the provisions of Senate Bill No. 41, enacted by the 69th General Assembly of Missouri.



July 29, 1957

H. M. Hardwicke, M. D.
Acting Director
Division of Health
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Would your office be good enough to render us an opinion as to whether 'Boarding homes for children' as characterized by the Convent of the Good Shepherd located in St. Louis, Missouri, are subject to the provisions of Senate Bill No. 41 as enacted into law. The reason that institutions of this type present a problem is that they do not render nursing care nor offer medical attention to their resident children. In point of fact, it is our understanding that they offer only re-education of the child, in addition to food, shelter and laundry.

"We have assumed that homes offering nursing and medical care to retarded convalescent or chronically ill children do come under the intent of the nursing home licensing law. On a basis of this understanding we are requiring such homes to meet all provisions of the law."

Senate Bill No. 41, enacted by the 69th General Assembly and signed by the Governor, repealed and re-enacted an act found in Laws of Missouri 1955, page 698, which in turn repealed Sections 198.010 through 198.070, RSMo 1949. These sections, found in the Revised Statutes of Missouri, 1949, were enacted in 1941 and are to be found in Laws of 1941, page 368. The title of this original Bill read:

"AN ACT to provide for the licensing of convalescent, nursing, shelter or boarding homes for aged, chronically ill or incurable persons, and for the terms and fees of such licenses and the

H. M. Hardwicke, M. D.

revocation thereof; requiring written application for such license; providing for inspection of the licensed premises; authorizing the State Board of Health to prescribe general rules and regulations and providing penalty for the violation thereof."

We believe that the title to the original Bill, quoted above, remains the title to the current Bill, Senate Bill No. 41. The title to the original Bill was limited to nursing homes for the aged, chronically ill or incurable persons. We believe that such limitation would be applicable to the present Bill.

In this regard, we direct attention to Section 23 of Article III of the Constitution of Missouri, which reads:

"No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated."

CONCLUSION

It is the opinion of this department that the home for children known as the Convent of the Good Shepherd, located at 3801 Gravois Avenue, St. Louis, Missouri, is not subject to the provisions of Senate Bill No. 41, enacted by the 69th General Assembly of Missouri.

The foregoing opinion, which is hereby approved, was prepared by Assistant Attorney General Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

By

Robert R. Welborn
Assistant Attorney General

SIGNING DEATH CERTIFICATES:
DEFINITION OF "PHYSICIAN":

A dentist is not a "physician" as that term is used in the Laws of Missouri authorizing a "physician" to sign a death certificate under certain circumstances.



August 1, 1957

H. M. Hardwicke, M. D.
Acting Director
Division of Health
Jefferson City, Missouri

Dear Dr. Hardwicke:

Your recent request for an official opinion reads:

"We have received a request for clarification of the law as it may relate to practicing dentists in the State of Missouri. Apparently this matter is of some very real importance to those dentists who, either in hospitals or in their private offices, give general anesthesia and as a result are presented with the possibility of sudden death of the patient from anesthetic causes. The question of whether a dentist licensed in the State of Missouri has a right to sign a death certificate is an important one, particularly in relation to the organization of a hospital staff which accepts dentists as members.

"The memorandum in question is quoted in its entirety for your information:

'I have been appointed to a committee of the St. Margaret's Hospital Dental Staff to investigate the legality of a doctor of dental surgery signing a death certificate.

'Kindly inform me as to the interpretation of the Revised Statutes of Missouri, 1949, (L. 1947, VII, p 232, PP 14) in regard to the term "physician". In the index, "physician" appears to be an all inclusive term including not only doctors of dentistry, but also osteopathic physicians and chiropractors.'"

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Section 193.140, RSMo 1949, which is the statute to which you refer, provides as follows:

"Person in charge of interment to secure what facts--referral to coroner, when.--

(1) The person in charge of interment shall file with the local registrar of the district in which the death or stillbirth occurred or the body was found a certificate of death or stillbirth within 3 days after the occurrence.

"(2) In preparing a certificate of death or stillbirth the person in charge of interment shall obtain and enter on the certificate the personal data required by the division from the persons best qualified to supply them. He shall present the certificate of death to the physician last in attendance upon the deceased or to the coroner having jurisdiction who shall thereupon certify the cause of death according to his best knowledge and belief. He shall present the certificate of stillbirth to the physician, midwife or other person in attendance at the stillbirth, who shall certify the stillbirth and such medical data pertaining thereto as he can furnish.

"(3) Thereupon the person in charge of interment shall notify the appropriate local registrar, if the death occurred without medical attendance, or the physician last in attendance fails to sign the death certificate. In such event the local registrar shall inform the local health officer and refer the case to him for immediate investigation and certification of the cause of death prior to issuing a permit for burial, cremation or other disposition of the body. When the local health officer is not a physician or when there is no such officer, the local registrar may complete the certificate on the basis of information received from relatives of the deceased or others having knowledge of the facts. If the circumstances suggest that the death or stillbirth was caused by other than natural causes, the local registrar shall refer the case to the coroner for investigation and certification."

The following cases hold that a dentist is not a "physician" as that term is used in the law.

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In the case of *People v. De France*, 62 N.W. 709, at l.c. 711, the Supreme Court of Michigan stated:

"Counsel contend that the testimony of the witness Land was a privileged communication, under the provisions of section 7516, How. St., which provides that 'no person duly authorized to practice medicine or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.' The question presented is whether this language includes a dentist. At the common law, information gained by a physician or surgeon while in attendance upon his patient was not privileged. The purpose of this statute was to throw around such disclosures as the patient is bound to make for the information of his attending physician the cloak of secrecy, and the prime object of the act was to invite confidence in respect to ailments of a secret nature, and the spirit of the act would not include a case where the infirmity was apparent to every one on inspection. In practice, however, the statute has not been so limited in construction, for the reason that the words of the act are broad enough to include any information necessary to enable the physician to prescribe or the surgeon to act. Nevertheless, the purpose of the act is to be considered in determining whether the dentist was intended to be included within its terms. Certainly the terms 'dentist' and 'surgeon' are not interchangeable, and if a dentist is to be held to be a surgeon, within the meaning of this act, it must be because his business as a dentist is a branch of surgery. It is apparent that the act related to general practitioners, and to those whose business as a whole comes within the definition of 'physician' or 'surgeon.' A dentist is one whose profession it is to clean and extract teeth, repair them when diseased, and replace them, when necessary, by artificial ones. The only case which we have found which bears directly upon this question is that of

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State v. Fisher (Mo. Sup.) 24 S.W. 167, in which a majority of the supreme court of Missouri held that a dentist is not to be considered a surgeon. * * *."

In the case of The State ex rel. v. Fisher (119 Mo. 344), the issue before the Court was whether a dentist was exempt from jury service. Exemption was granted by a dentist on the basis of the following portion of Section 6062, RSMo 1889, which exempted a "person exercising the functions of a * * * practitioner of medicine." In regard to the claim of the dentist relator that he came within the provisions of this portion of the statute, the court, in holding that the relator did not come within this statute, stated:

"Here it can not be successfully claimed that relator finds any exemption in the terms of the statute, for certainly he is not a 'practitioner of medicine and surgery in any of their departments,' as defined in section 6871, nor does he exhibit the qualifications required by that section, to wit, a diploma from a legally chartered medical institution in good standing and a certificate from the board of health. His contention, stripped of all verbiage and disguises, and stated baldly and boldly, simply is, that, inasmuch as he possesses a diploma, granted him by a reputable dental college, and a certificate of the city register showing the filing of that diploma and the enrollment of his name on the 'Roll of Dental Surgeons,' that, therefore, he is entitled to the same exemptions from jury service as if, instead of qualifying under the provisions of section 6889, he had actually qualified under those of section 6871. This contention, for reasons already given, can not prevail; it will not bear a moment's scrutiny. Either relator is a practitioner of medicine and surgery, or he is not. If not, that determines this litigation against him; if he is such practitioner, then this fact avails him nothing until he complies with the terms and conditions of section 6871 and its associate sections. The law, by the terms it employs, means a lawful 'practitioner of medicine,' not one who fails to comply with its requirements. Relator makes no pretense of such compliance. The statute in question being

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couched in unambiguous terms, its words are to be taken 'in their plain or ordinary and usual sense. R. S. 1889, Sec. 6570."

In the case of State v. McMinn, 24 S.E. 523, at l.c. 524, the Supreme Court of North Carolina stated:

"The court instructed the jury that a prescription from a dental surgeon was not 'a prescription from a physician,' which would protect one who sold intoxicating liquor on Sunday. Code, § 1117. 'A physician is one authorized to prescribe remedies for and treat diseases; a doctor of medicine.' Webster. Dict. To the same purport are the Century and the Standard Dictionaries. A dentist or dental surgeon is one who performs manual or mechanical operations to preserve teeth, to cleanse, extract, insert, or repair them. The statutes of this state recognize that dentists are not included in the term 'physician,' the latter being regulated by Code, §§ 3121-3134, with the amendatory acts of 1885 (chapters 117 and 261) and 1889 (chapter 181), while dentists are governed by Code, §§ 3148-3156, and the amendatory acts of 1887 (chapter 178) and 1891 (chapter 251). If dentists came within the term 'physician' as used in Code, § 1117, 'toothache' would become more alarmingly prevalent than 'snake bite'; and that it would, with usage, become more dangerous, is evident from the fact that the very first dental surgeon's prescription for toothache, coming before us, is for 'one pint of whiskey.' The size of the tooth is not given, nor whether it was a molar, incisor, eye tooth, or wisdom tooth; and yet there are 32 teeth in a full set, each of which might ache on Sunday. The duties of a dentist are limited to the 'manual or mechanical operations' on the teeth. Whenever the use of liquor is necessary, it being a remedy to act on the body, and only indirectly in any case for the teeth, within the purview of the statute, it must be prescribed by a 'physician,' to authorize a sale on Sunday."

In the case of Gulf, Mobile and N. R. Co. v. Willis, 157 So. 899, at l.c. 901, the Supreme Court of Mississippi stated:

"(2-4) We are of opinion that a dentist is not a physician within the intent and meaning

H. M. Hardwicke, M. D.

of section 1536, Code of 1930. The purpose of this statute was to protect physicians and surgeons from having to testify as to communications made to them in their professional capacity, and to protect patients from having to disclose statements made to physicians. * * *."

On the basis of the above, we do not believe that a dentist comes within the meaning of the word "physician" as that term is used in the law of Missouri regarding the signing of death certificates.

CONCLUSION

It is the opinion of this department that a dentist is not a "physician" as that term is used in the laws of Missouri authorizing a "physician" to sign a death certificate under certain circumstances.

The foregoing opinion, which is hereby approved, was prepared by Assistant Attorney General Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

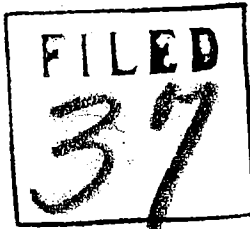
By

Robert R. Welborn
Assistant Attorney General

HPW/bA

APPROPRIATIONS:
PENITENTIARY:
DEPARTMENT OF CORRECTIONS:

Use of funds appropriated in Section 1, House Bill No. 312, Sixty-ninth General Assembly, for "Additions, Repairs and Replacements" at penal institutions.



September 19, 1957

Mr. C. R. Hardy
Auditor
Department of Corrections
Jefferson City, Missouri

Dear Mr. Hardy:

This refers to your letter requesting an opinion of this office concerning the interpretation of certain provisions of House Bill No. 312, Sixty-ninth General Assembly, which request reads as follows:

"House Bill No. 312 of the Sixty-ninth General Assembly, an Act to appropriate money from the Second State Building Fund to the State Penitentiary and other state institutions, provides under Section 1, Lines 28 to 38, as follows:

'Additions, Repairs and Replacements:

'For remodeling of buildings, repairing of buildings, repairing and replacement of equipment, and equipping all buildings and grounds for the present State Penitentiary, present Women's Prison Buildings, Prison Farms, and Intermediate Reformatory, and any other necessary improvements, such repairs, replacements and remodeling and the priority of the same to be determined and the work approved by the Director of Public Buildings before payment.'

"An opinion is respectfully requested as to items that may, or may not, be purchased from the above mentioned appropriation:

1. May funds be used for constructing a new building or buildings?
2. What should 'repairs and replacements of equipment' include?

Mr. G. R. Hardy

3. Would this cover repair of motor equipment and purchase of new motor equipment for use in the 'Repairs and Replacement' work?

4. May funds be used for purchase of tools to perform the work to be done?

5. Would the purchase of new hospital equipment, new kitchen equipment, new office equipment, new garage equipment, new fire engine and equipment be permitted under this appropriation?

6. Would employment of skilled labor, to oversee remodeling and repairing work, be permitted and the employment of additional clerical force to handle such necessary work?"

With respect to the use of the funds in question for the construction of new buildings, we point out that the statutory provision which you quote contains nothing specifically authorizing the use of the funds for this purpose. Instead, it authorizes the use of the funds for remodeling, repairing and equipping buildings, without mentioning the construction of new buildings. There is nothing which could conceivably be contended to refer to the construction of new buildings other than the phrase "and any other necessary improvements"; and, considered in its context, it does not appear that this phrase should be so construed.

In the same connection, it should be noted that the provision of House Bill No. 312 which you quote is a reappropriation of funds originally appropriated in a law passed by the 68th General Assembly (Laws of Missouri, 1955, Extra Session, page 4). In the law passed by the 68th General Assembly, the caption to this provision reads "Repairs and Replacements". In House Bill No. 312, this caption was changed to read "Additions, Repairs and Replacements", but there was no change in the body of the provision for the purpose of authorizing "additions", except the substitution of the words "and equipping" for the word "to", so as expressly to authorize the purchase of new equipment.

Further, it will be noted that in Section 1 of House Bill No. 312, preceding the provision which you quote, there is a provision, under the caption "Additions", which expressly appropriates money for the construction of new buildings. In this respect, such section is the same as the corresponding section of the law passed by the 68th General Assembly; and it is in accord with the

Mr. C. R. Hardy

pattern followed throughout House Bill No. 312, and the laws passed by the 68th General Assembly dealing with the same subject, which was for each section to deal first with appropriations for the construction of new buildings and then with appropriations for repairs and replacements and miscellaneous items.

In the circumstances, it is the opinion of this office that the statutory provision which you quote cannot be construed to authorize the use of the funds appropriated thereby for the purpose of constructing new buildings.

We turn now to a discussion of factors to be considered in answering your other questions. The statutory provision which you quote authorizes the use of the funds appropriated thereby for "repairing and replacement of equipment, and equipping all buildings and grounds" for various penal institutions. It will be noted that "equipping" relates specifically to "buildings and grounds". The phrase "repairing and replacement of equipment" is not so definitely tied to "buildings and grounds". However, in the corresponding section of the law passed by the 68th General Assembly, the language was "repairing and replacement of equipment to all buildings and grounds"; and it is questionable, at best, whether there was any intention that the provision in House Bill No. 312 should have a different meaning in this respect.

In any event, the statutory provision in question, which appropriates money in the Second State Building Fund, is limited by, and must be construed in the light of, Section 37(a) of article III of the Constitution of Missouri, which creates that Fund (State ex rel. State Building Commission v. Smith, Mo., 81 S.W. 2d 613). Section 37(a), which was added to the Constitution by the amendment approved at the election on January 24, 1956, authorizes the issuance of \$75,000,000 in bonds for certain purposes and provides that the proceeds of the sale of the bonds shall be paid into the Second State Building Fund and shall be used only for the purposes for which the bonds are authorized to be issued (see Laws of Missouri, 1955, page 867). The purposes for which the bonds may be issued are stated as follows:

"* * * for the purpose of repairing, remodeling or rebuilding, or of repairing, remodeling and rebuilding state buildings and properties at all or any of the penal, correctional and reformatory institutions of this state, the state training schools, state hospitals and state schools and other eleemosynary institutions of this state, and institutions of higher education of this state, and for building additions thereto and additional buildings where

Mr. C. R. Hardy

necessary, and for furnishing and equipping any such improvements."

In connection with repairing, remodeling, and rebuilding, the words "buildings and properties" are used, and these words, of course, must be given a somewhat broader meaning than "buildings" alone. However, it is believed that the rather vague and general term "properties" must be construed in the light of, and its meaning is limited by, its use in connection with the word "buildings" and the later reference to "any such improvements." Insofar as the purchase of furniture and equipment is concerned, the only authorization is in the last phrase which authorizes the furnishing and equipping of "any such improvements". Inherent throughout the language used in stating the purposes of the bonds is the concept that the bonds are to provide money for the rehabilitation and construction, and the furnishing and equipping, of buildings, and for items closely related or comparable thereto; and such was the common understanding of the bond program when the constitutional amendment was under consideration.

On the basis of the foregoing, it is our conclusion that the funds appropriated by the statutory provision quoted by you may be used for the purchase of new equipment for buildings, and that, while questions might arise concerning specific items, this would include generally hospital, kitchen, office, and garage equipment. However, we do not see how either the statute or the basic constitutional provision can be so construed as to permit the use of the funds for the purchase of a new fire engine and equipment.

With respect to the purchase and repair of motor equipment, and the purchase of tools, for use in making repairs, we do not regard such equipment and tools as being "equipment" or "properties" such as are contemplated by the constitutional amendment authorizing the bonds. It is our opinion, however, that the cost of such equipment and tools, or a portion thereof, may be properly regarded as a cost of the repair of buildings contemplated by the constitutional amendment and statute, and may be paid from proceeds of the bonds appropriated for that purpose. This necessarily involves a question of fact as to the extent to which the equipment and tools are to be used and expended in making such repairs. There may be instances in which such equipment and tools may be used both in making such repairs and in general operations of the penitentiary or where they may have substantial resale value when their use in making such repairs has ended. Such factors must be considered in determining whether, and to what extent, the cost of the equipment and tools may be paid from the bond proceeds as a cost of authorized building repairs; and the determination in each instance must depend upon the facts of the particular case.

Mr. G. R. Hardy

With respect to the employment of skilled labor and clerical employees in connection with repair and remodeling work and the payment of their salaries from this appropriation, we enclose a copy of an opinion furnished by this office to Truman L. Ingle, under date of October 15, 1943, in which the conclusion was reached that the salaries of employees performing services in connection with "repairs and replacements" and "additions" could be paid out of funds appropriated for those purposes. That opinion is equally applicable here.

CONCLUSION

It is the opinion of this office that funds appropriated by Section 1, House Bill No. 312, Sixty-ninth General Assembly, for "Additions, Repairs and Replacements" at penal institutions (1) cannot be used for the construction of new buildings, (2) can be used for the purchase of equipment for buildings, which would include generally hospital, kitchen, office, and garage equipment, (3) cannot be used for the purchase of a new fire engine and equipment, (4) can be used for the purchase or repair of equipment and tools for use in making repairs to buildings, to the extent that, on the basis of facts of particular cases, such expenditures can be classified as a cost of the building repairs, and (5) can be used to pay salaries of employees performing services in connection with repairs and remodeling.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Baumann.

Yours very truly,

John M. Dalton
Attorney General

JCB/lc/bi

Enc.

MISSOURI CONSERVATION
COMMISSION:
REGULATIONS FOR LAKE
WAPPAPELLO:



Regulations promulgated by the Missouri Conservation Commission, which regulations are that decoys shall not be left unattended in the Lake Wappapello area and that shooting blinds erected by private individuals in that area may be occupied by the first person who reaches them and finds them vacant are within the power of the Conservation Commission to make.

January 2, 1957

Honorable Rex A. Henson
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I would like to have your opinion on some of the recent rules and regulations of the Missouri Conservation Commission with respect to the coming duck season.

"When a meeting of the sportsmen was held in Poplar Bluff a few days ago, I was informed that you attended the meeting at which this problem was discussed, and you are, no doubt, familiar with the discontent among many of the hunters in this area.

"My first impression upon reading the recent rules and particularly the rules which provide that duck decoys left unattended in the hunting area are subject to seizure by the Commission, and the rule which provides that the duck blinds constructed in a public area such as Wappapello Lake are open to the public on a 'first come-first serve' basis, were rules which could not be enforced by the Commission because it appeared to me that these acts would constitute a confiscation of property in violation of the Constitution and the general laws of the state.

"Without going into the merit of the complaints of the various hunters over

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these rules and regulations, I would appreciate an opinion at an early date from you as to whether or not the laws of this state permit the Missouri Conservation Commission to pass and enforce the rules and regulations above-referred to."

The regulations upon this matter, to which you refer, together with some comments regarding them, read as follows:

"1. Waterfowl hunting privileges shall be provided on a 'first-come-first served' basis.

"2. Hunters shall build their own blinds. However, the construction of a blind or other hunting facility shall not give the builder any preference or priority rights on the use of such blind or hunting facility; neither shall it give the builder any preference or priority rights on the construction of a blind or other hunting facility on the same site in any subsequent year.

"3. Unoccupied blinds may be used by the first hunter who comes along. The builder shall not claim priority or the right to evict the first hunter who occupies the blind each day. It shall be illegal during the open hunting season to lock, bar, or otherwise render unusable any blind located on this area. Any incompleated blinds existing as such on or after the opening date of the waterfowl season may be completed and occupied on any day of the open shooting season by any hunter or hunters on a 'first come - first served' basis.

"4. Occupied blinds shall not be closer than 200 yards apart.

"5. No commercially-operated blinds will be permitted.

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"6. No decoys shall be left in hunting position unattended at any time. No decoys shall be stored in or near the blind or on the public hunting grounds overnight. Each hunting party shall remove the decoys they are using from the public hunting grounds when they cease hunting.

"REMARKS:

"The Wappapello Reservoir was opened to public hunting under a 20 year license granted to the Conservation Commission by the Secretary of War in 1946.

"Hunting pressure on the area has increased from less than 25 duck blinds in 1946 to over 600 blinds in 1955.

"The Missouri Conservation Commission has handled hunting on the Wappapello area on an administrative basis from 1946 to date. Each year a plan of management is drawn up and submitted to the U.S. Corps of Engineers for the current year's operation.

"The Corps of Engineers representatives have indicated they are in favor of firm regulations being inaugurated by the Commission to minimize some of the problems which have arisen on the area. They strongly disapprove of commercializing of duck hunting by a few resort owners. The regulations proposed for the Wappapello area are almost identical to those in force on similar Corps of Engineers lands on the Mississippi River between St. Louis and the Iowa line."

We believe that the regulations relating to unattended decoys is answered by an opinion, a copy of which is enclosed, rendered on June 24, 1953, to W. T. Bollinger, Jr., Representative from Carter County. You will note that this opinion holds that no Conservation Commission agent or other officer has any lawful authority to confiscate or

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hold permanently or destroy property of an individual used in the violation of the game and fish law or regulations of the Conservation Commission, but that such officer or agent may only take temporarily into his custody any such property to be used as evidence in the prosecution of a violator.

Section 252.230, RSMo 1949 reads:

"Any person violating any of the provisions of this chapter wherein other specific punishment is not provided, and any person violating any of such rules and regulations relating to wild life, shall be guilty of a misdemeanor and upon conviction shall be punished by imprisonment in the county jail not exceeding three months or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment."

We believe that these decoys could be seized by a conservation agent, if the decoys were left unattended in violation of the regulation, and used for purposes of evidence in a prosecution under the above section. We believe that after such use they must be returned to the owner.

Your other question is in regard to the occupancy of duck blinds erected on the Lake Wappapello area by private individuals. Wappapello is owned by the Federal Government and is administered by the United States Department of Army Corps of Engineers. On October 10, 1946, the Secretary of War issued the following:

"The SECRETARY OF WAR, under authority of Section 4 of the act of Congress approved 22 December 1944 (Public Law 534, 78th Congress; 58 Stat. 887, 889), hereby grants to the MISSOURI CONSERVATION COMMISSION of the State of Missouri a license for a period of twenty (20) years, but revocable at will by the Secretary of War, to occupy and use, for the purpose of managing and controlling all wildlife resources, land and water areas in the WAPPAPELLO RESERVOIR AREA, Missouri, as outlined in red on the map

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attached hereto and made a part thereof.

"THIS LICENSE is granted subject to the following provisions and conditions:

"1. That the exercise of the privileges hereby granted shall be without cost or expense to the WAR DEPARTMENT, shall be subject to the approval of the District Engineer in charge of the locality, and shall effectuate the attached general plan of management, and the specific and detailed activities under said plan of Management shall be submitted to the said District Engineer by the Conservation Commission, State of Missouri, on or before 1 April 1947 and annually on or before 1 April thereafter and shall be subject to the approval of the said District Engineer.

* * * * *

Pursuant to the above the Missouri Conservation Commission enacted, by virtue of its regulation making power, Article IV, Sections 40 - 46, Constitution of Missouri, the regulations above set forth in regard to duck blinds and decoys.

The "plan of management" of the Wappapello area as worked out by the Missouri Conservation Commission was, we are informed, unofficially approved by the Army Corps of Engineers shortly after its completion. The Army Corps of Engineers, with full knowledge of the plan of management since its inception, has at no time subsequent made any criticism of it, which amounts to tacit consent.

It does appear in order for the general public to use and enjoy the Wappapello area the regulation regarding the use of duck blinds is necessary in order to keep a few persons from monopolizing the area and commercializing that to which the general public should be able to freely use.

CONCLUSION

It is the opinion of this department that the regulations promulgated by the Missouri Conservation Commission,

Honorable Rex A. Henson

which regulations are that decoys shall not be left unattended in the Lake Wappapello area and that shooting blinds erected by private individuals in that area may be occupied by the first person who reaches them and finds them vacant are within the power of the Conservation Commission to make.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

1 enclosure

EGGS:
EGG LAW:

A farmer selling eggs produced by his flock on his farm to customers in a town via door to door route need not grade or label said eggs nor does he need a license to sell said eggs as a door to door route is not an established place of business as referred to in Sections 196.313 and 196.328, RSMo Cum. Supp. 1955.



October 15, 1957

Honorable W. D. Hibler, Jr.
State Representative
Chariton County
Brunswick, Missouri

Dear Sir:

This is in answer to your opinion request to this office dated August 7, 1957, and reading in part as follows:

"The question is whether a farmer is allowed to sell eggs which he produces on his farm to private customers in town for their own use without grading or and labeling them."

The statutory provisions to which you refer in your letter of request are Sections 196.313 and 196.328, Cum. Supp. 1955. These sections provide in part as follows:

"196.313--No person shall buy, sell, trade or traffic in eggs in this state without a license with the following exceptions:

"(1) Those who sell only eggs produced by their own flocks, provided such eggs are not sold at an established place of business away from the premises of such producer;"

"196.328--No markings are required on containers or subcontainers of eggs:

* * * * *

"(2) When sales are made without advertising, by the producer, from eggs produced on his own premises and are not sold at an established place of business away from premises of such producer;"

Honorable W. D. Hibler, Jr.

As we interpret your opinion request, the farmer to whom you have reference therein is delivering eggs produced by his flock via a door to door route to consumers in a city. If this is the correct factual situation, then the farmer under the above statutes does not have to grade or label his eggs, nor does he have to have a license to sell said eggs. An "established place of business" as used in the above statutes referred to a permanent place of business such as a grocery store or produce market and does not include selling door to door.

CONCLUSION

It is the opinion of this office that a farmer selling eggs produced by his flock on his farm to customers in a town via a door to door route need not grade or label said eggs, nor does he need a license to sell said eggs as a door to door route is not an established place of business as referred to in Sections 196.313 and 196.328, RSMo Cum. Supp. 1955.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard W. Dahms.

Very truly yours,

John M. Dalton
Attorney General

RWD:mw:hw

MISSOURI REAL ESTATE
COMMISSION:

The Missouri Real Estate Commission cannot pay to the Missouri Real Estate Association twenty-five dollars a month for postage on the Missouri Real Estate Association Bulletin, as the legislature has not appropriated funds to the Commission for that purpose.



January 11, 1957

Honorable J. W. Hobbs, Secretary
Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri

Dear Mr. Hobbs:

This is in answer to your opinion request to this office dated December 11, 1956, and reading as follows:

"The Missouri Real Estate Association, a state association of real estate licensees, publish a monthly bulletin to its members. This commission has never had an appropriation or allowance for the expense of education to applicants or licensees.

"The members of the commission have been invited to use the service of the above bulletin with information in regard to our rules and regulations, the requirements of the Missouri Real Estate License Law, the explanation of subjects used in the examination for licenses, etc.

"The request for an opinion is: Can this commission pay to the Missouri Real Estate Association, through the State Treasurer, the amount of twenty five dollars a month, to be used as postage in mailing the monthly bulletin to members?"

The Missouri Real Estate Commission was created by Section 339.120, RSMo 1949. That section reads in part as follows:

"There is hereby created the 'Missouri Real Estate Commission,' * * * for the purpose of carrying out and enforcing the provisions of this chapter. * * *."

In order for the Missouri Real Estate Commission to pay any funds over to the Missouri Real Estate Association to be used as postage on the bulletin of the above named association, there would have to be an appropriation by the legislature to the Missouri Real Estate Commission for that specific purpose. There has been no such appropriation.

Honorable J. W. Hobbs

Section 339.070, RSMo 1949, provides as follows:

"All fees and charges payable under this chapter shall be collected by the division of collection in the department of revenue. No money shall be paid out of this fund except by an appropriation by the general assembly. Warrants shall be issued monthly, upon the state treasurer out of this fund only, for the payment of the salaries and all necessary expenses of said commission. Vouchers for said salaries and expenses shall be first approved by the commission. Any surplus remaining in said fund at the end of the biennium shall be paid into the general revenue fund. The total expense for every purpose incurred by the commission shall not exceed the total fees and charges collected and paid into the state treasury."

As can be seen from this section, the Commission receives its operating funds through appropriations from the legislature and no moneys can be paid out without an appropriation from the legislature. The legislative appropriation for the Commission, beginning July 1, 1955 and ending June 30, 1957, is found at page 179 of the Laws of 1955, and is Section 7.380 of the Laws of 1955. The legislature, in that section, appropriated \$98,000.00 total to the Commission for the use of the Commission. None of this \$98,000 was appropriated to the Commission to be given by the Commission to the Missouri Real Estate Association to be used as postage for that association's bulletin. All of the money was appropriated "for the use of the Missouri Real Estate Commission." The appropriation would be violated if any part thereof was to be used for any purpose other than that for which it was specified in the appropriation section. The use of a part thereof for postage on the Missouri Real Estate Association Bulletin would not be using the money for the purposes for which it was appropriated.

CONCLUSION

It is therefore the opinion of this office that the Missouri Real Estate Commission cannot pay through the State Treasurer to the Missouri Real Estate Association twenty-five dollars a month to be used as postage on the Missouri Real Estate Association Bulletin as the legislature has not appropriated funds to the Missouri Real Estate Commission to be used for that purpose.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard W. Dahms.

Yours very truly,

JOHN M. DALTON
Attorney General

STATE AUDITOR:
BIENNIAL AUDIT OF SIX-
DIRECTOR SCHOOL DISTRICT:

An audit made by the State Auditor pursuant to a petition by parties in a school district under Section 29.230, is, where such audit follows the requirements of Section 165.115 and is accepted by the board of directors, sufficient to obviate the necessity of the board of directors of a six-director school district to arrange for the biennial audit required in Section 165.115, RSMo 1955 Cum. Supp.

May 20, 1957

Honorable Haskell Holman
State Auditor
State Capitol Building
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your recent opinion request in which you ask the following:

"The Sixty-eighth General Assembly of Missouri, 1955, enacted Senate Bill No. 107 (which now is Section 165.115, Cumulative Supplement, 1955) requiring the board of directors of each six-director school district to arrange for a biennial audit of its financial affairs and attendance records. However, this department has received a petition containing the signatures of five per cent of the qualified voters of a six-director school district requesting an audit of the books and accounts of the school district as provided by Section 29.230, R.S.Mo., 1949.

"In this connection, an audit which will follow the requirements set forth in Section 165.115, Cumulative Supplement, 1955, will be made of the financial records of the school district covering a two-year period.

"I will appreciate your advice and official opinion in answer to the following question:

1. Will it be necessary for the board of directors of a six-director school district to arrange for the biennial audit of

Honorable Haskell Holman

its financial affairs and attendance records required under the provisions of Section 165.115, Cumulative Supplement, 1955, in addition to the audit made by the state auditor?"

The statutes involved herein are Sections 29.230, RSMo 1949, and 165.115 RSMo Cum. Supp. 1955.

Section 29.230 is a lengthy one and shall not be set forth fully herein; however, the pertinent part of said statute reads as follows:

"* * * He [the auditor] shall audit any department, board, bureau or commission of the state which is under the control or supervision of the governor or any other elected official of the state, upon the request of the governor, and he shall further audit any political subdivision of the state whenever requested to do so by five per cent of the qualified voters of such political subdivision, determined on the basis of the votes cast for the office of governor in the last election held. Such political subdivision shall pay the actual cost thereof; provided, that no political subdivision shall be so audited by petitions more than once in any one calendar or fiscal year."
(Words in brackets supplied.)

The other statute, Section 165.115 reads as follows:

"1. The board of directors of each six-director school district is required to arrange for a biennial audit of its financial and attendance records. The audit shall be made and sworn to by someone selected, but not regularly employed by the board of directors. The expenses of the audit shall be paid out of the incidental fund of the district.

"2. The board of directors may conduct special investigations in addition to the

Honorable Haskell Holman

regular biennial audit.

"3. The prosecuting attorney of the county in which such district is located, or, if such district be a part of two or more counties, the prosecuting attorney of the county in which the greater portion of the assessed valuation of such district lies, shall provide legal counsel and advice when requested by the auditor during the progress of the audit.

"4. All six-director school districts shall be subject to the same type of audit which shall include the following:

- (1) An examination and analysis of sources of income;
- (2) Verification of disbursements;
- (3) Reconciliation of budget items with actual receipts and disbursements;
- (4) A report of budget procedures;
- (5) An examination of legal authorization for expenditures;
- (6) An examination of board minutes, insurance policies, contracts and deeds to real estate;
- (7) Verification of assets and liabilities;
- (8) An analysis of bonded indebtedness;
- (9) An examination of capital assets, inventories, surplus accounts and vouchers payable;
- (10) Verification of all accounts paid through examination of vouchers;

Honorable Haskell Holman

- (11) A statement of whether or not the fiscal affairs of the district have been administered according to law;
- (12) An evaluation of the accounting system.

"5. The auditors shall submit copies of the audit report to each member of the board of directors, and the board shall submit the audit to the state department of education, and the county superintendent of schools immediately upon its completion. If the audit is not received by the state department of education within one hundred and twenty days following the close of the fiscal year all state aid shall be withheld until such audit is filed.

"6. The board of directors shall publish a summary of the audit report within thirty days of its receipt with a statement of where it is on file and advising that it is available for inspection."

Having set forth the question involved and the statutes giving rise to such question, it should be mentioned that there are no cases determining such question, nor have any cases been found involving analogous questions. Consequently, the question at hand must necessarily be resolved, mainly, from a study of the two above mentioned statutes.

As can be noted from Section 165.115, above, the board of directors of a six-director school district is required to arrange for a biennial audit of its financial and attendance records.

The next requirement is that the audit shall be made and sworn to by someone selected, but not regularly employed, by the board of directors.

Then, in Subsection 4 of this section the various matters which the audit shall include are set forth.

As a consequence of the audit which is required when there is a petition filed pursuant to Section 29.230, supra, and the

Honorable Haskell Holman

audit which the board of directors is required to have made under Section 165.115, supra, the particular school district is placed under a financial burden since it must pay for both audits. And, of course, the audits may cover the same period of time which further illustrates that, if possible, one audit should suffice.

Whether or not one audit is sufficient, or in other words, whether an audit made pursuant to a petition under Section 29.230, supra, is sufficient to satisfy the requirement of Section 165.115, supra, would depend upon whether or not the particular audit followed the requirements of the latter section. Since such audit could follow the requirements of Section 165.115, there being no limitation placed upon the matters covered in the audit under Section 29.230, and it having been stated in the opinion request that such audit will follow the requirements of Section 165.115, then the one audit would be sufficient. It should be further pointed out that such an audit would have to be accepted by the board of directors of the particular school district since such body is authorized to select the party who shall make the audit required in Section 165.115.

If, as stated in the opinion request, the audit made pursuant to a petition under Section 29.230 follows the requirements of Section 165.115, and is accepted by the board of directors of the particular school district, then such audit would satisfy the requirement of the biennial audit under Section 165.115.

CONCLUSION

It is, therefore, the opinion of this office that an audit made by the State Auditor pursuant to a petition by parties in a school district under Section 29.230, is, where such audit follows the requirements of Section 165.115 and is accepted by the board of directors, sufficient to obviate the necessity of the board of directors of a six-director school district to arrange for the biennial audit required in Section 165.115, RSMo 1955 Cum. Supp.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Henry.

Yours very truly,

John M. Dalton
Attorney General

ASSESSORS: County assessor or deputies of all counties except class
TAXATION: one counties and the City of St. Louis must call at office,
REVENUE: place of doing business or residence of each property owner
COUNTIES: in county and require them to make a list of all taxable
real and tangible personal property owned by such person in
county. Property owner has the duty to fill in the valuation
of all real and personal property included in assessment
list.



February 19, 1957

Honorable John A. Johnson
State Senator
24th Senatorial District
Ellington, Missouri

Dear Senator Johnson:

This is in answer to your opinion request to this office dated February 7, 1957, and which reads as follows:

"Pursuant to a request from the Reynolds County Court, I hereby request your opinion on the following matter:

"The assessor of Reynolds County has devised a means of assessment which the county court thinks is illegal. I would like therefore to have your opinion as to whether or not this is a legal manner in which to make assessments.

"The assessor has been mailing out assessment blanks and asking the property owners to fill in the description of the property and to leave the valuation blank open. He has advised the property owners that he will later fill in the proper figure in the valuation column. This is being done by mail."

In answer to your first inquiry as to whether it is illegal for the assessor to mail out assessment blanks to the property owners asking them to fill in the description of the property, we are attaching hereto two opinions from this office to the Honorable Clarence Evans, dated March 2, 1949, and to Honorable Allen Rolston, dated December 21, 1949. These opinions hold that it is the duty of the assessor to call at the office, place of doing business or residence of each property owner within the county, excepting class one counties and the City of St. Louis, and to require such persons to make and return a correct statement of taxable, real and tangible personal property in the county owned by such property owner. These opinions hold that the statutory provision, which is now Section 137.115, RSMo. 1949, which directs the assessor to call at the office, place of doing business or

Honorable John A. Johnson

residence of each person required to list property, is mandatory and the assessor may not by any other means make his demand upon the property owners for the assessment lists. The assessor is not required to be present at the time the list is prepared, filed or sworn to by the property owner, nor is it necessary for the assessor to check the property except in cases where no list has been returned. In that event, it becomes the assessor's duty to check the property and prepare the lists himself. The assessor, after having called at the office, place of doing business or residence of the taxpayer, and having officially required that an assessment list be made, need not again call upon the taxpayer to take said list and check the property assessed. It is the duty of the taxpayer to deliver the completed assessment list to the assessor and the assessor may designate his office or some other place in the county as the place where the completed lists may be delivered or mailed to him.

As to your second inquiry, with regard to the request by the assessor that the property owners leave the valuation blank open, we find that Section 137.120, RSMo. 1949, sets out what the property list shall contain which the property owner is to prepare and submit to the assessor. This section provides as follows:

"Such lists shall contain:

(1) A list of all the real estate and its value;

(2) A list of all the livestock, showing the number of colts, yearlings, two year olds and all other horses, mares and geldings and their value; the number of colts, yearlings, two year olds and all other asses and jennets and their value; the number of colts, yearlings, two year olds and all other mules and their value; the number of calves, yearlings and all other neat cattle and their value; the number of pigs and all other hogs and their value; the number of lambs and all other sheep and their value; the number of kids and all other goats and their value; the number of domesticated rabbits, domesticated animals of all kinds and all other livestock and their value; the number of poultry including chickens, guineas, ducks and geese and their value, the number of turkeys and their value, the number of bee colonies and their value;

(3) An aggregate statement of all tractors, combines, threshing machines, drilling machines, power balers and all other farm machinery and implements and their value;

(4) A statement of household property including the number of pianos and other musical instruments, radios, clocks, watches, chains, and appendages, sewing machines, washing machines, refrigerators, gold and silver plates, jewelry, household and kitchen furniture and the value thereof;

(5) All trucks, motorcycles, airplanes and all other motor vehicles and their value;

(6) All steamboats, keelboards, wharf boats and all other vessels; all toll bridges, all printing presses, type and machinery therewith connected, and all portable mills of every description, and all paintings and statuary, and every other species of tangible personal property not exempt by law from taxation."

As can be seen from the reading of the section, it provides that the property owner is to not only state the various types of real and personal property which he owns, but also the value of that property.

It is the opinion of this office that the property owner has the duty to include in the list of property which he must submit to the assessor the valuation which he places on all the real and personal property owned by him.

CONCLUSION

It is the opinion of this office that the county assessor or his deputies in all counties other than class one counties and the City of St. Louis must call at the office, place of doing business or residence of each property owner in the county and require them to make a correct statement of all taxable real and tangible personal property in the county owned by such person. It is illegal for an assessor to mail out assessment blanks to the property owners asking the property owners to fill in the description of the property.

It is also the opinion of this office that the property owners have the duty to fill in the valuation of all real and personal property which they own and which they have included on the list, and it is improper for the assessor to require the property owners to leave the valuation blank open.

Honorable John A. Johnson

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard W. Dahms.

Yours very truly,

JOHN M. DALTON
Attorney General

RWD/b1

Enc. 2

SPECIAL ROAD DISTRICTS: Submission and approval of question of disorganization of special road district under authority of Sec. 233.160 RSMo 1949 does not prohibit immediate formation of new district under applicable statutes.



June 19, 1957

Honorable William G. Johnson
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Johnson:

This opinion is rendered in reply to your inquiry reading as follows:

"Section 233.160 of the Missouri Revised Statutes, 1949, provides a manner by which a special road district that has adopted the provisions of Sections 233.010 to 233.165, that the question may be resubmitted after expiration of 4 years upon the petition of 50 resident taxpayers of said district.

"The Syracuse Special Road District No. 1, of this county, was incorporated in 1913 and was dissolved under Section 233.160 Revised Statutes of Missouri, 1949, in the general election of November, 1956.

"50 resident taxpayers of Syracuse and surrounding territory have made application to the county court of Morgan County under Section 233.010 to organize a special road district to be known as the Syracuse Special Road District and the area to be included is less, but includes the same territory that was within the old special road district. I am enclosing a map of Morgan County wherein the old special road district organized in 1913 and dissolved in 1956 is drawn in blue pencil; the area marked in red is the proposed new special road district.

Honorable William G. Johnson

"I would appreciate you furnishing me with an official opinion as to the following question: Would Section 233.160 of the Revised Statutes of Missouri, 1949, preclude the organization of another special road district in Syracuse where the area asked to be included therein is part of the same area that was included in a dissolved special road district, or must the people of Syracuse wait the 4 years to have the question resubmitted as the above mentioned Section seems to indicate?"

Section 233.160 RSMo 1949 provides:

"1. If any district shall have adopted the provisions of sections 233.010 to 233.165 the question may be resubmitted after the expiration of four years upon the petition of fifty resident taxpayers of said district at the next general election, or at a special election to be held for that purpose at such time as the county court may order.

"2. The county court shall give notice of such election and of such submission by publishing the same in some newspaper published in the county, such notice to be published for two consecutive weeks, the last insertion to be within five days next before such election; and such other notice may be given as the court may think proper.

"3. The county court shall have the ballots for such election printed and shall have printed on such ballots 'For the disorganization of the special road district,' 'Against the disorganization of the special road district,' with the direction 'Erase the clause you do not favor.' If a majority of the votes upon such proposition be cast against it, said district shall be discontinued and the operation of the law shall cease in said district. In all other respect said election, and the results thereof, shall be governed by the provisions of sections 233.010 to 233.165."

Honorable William G. Johnson

The above quoted statute sets forth procedure for disorganization of the special road district to which the law is directed. Subparagraph 1 of the statute provides that the "question" may be resubmitted after the expiration of four years. The nature of the "question" to be resubmitted is clearly disclosed in the language to be printed on the ballot: "For the disorganization of the special road district," "Against the disorganization of the special road district." Clearly, the statute has no reference to the original formation of a road district.

CONCLUSION

It is the opinion of this office that Section 233.160 RSMo 1949 providing that the question of disorganization of a special road district may not be resubmitted until four years after the election adopting such road district will not prohibit incorporation of a new road district immediately after disorganization of the old district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly

John M. Dalton
Attorney General

JLO'M:hw

PROSECUTING ATTORNEYS:
SALARY INCREASE:
SENATE BILL NO. 198 :

Prosecuting attorneys in third and fourth class counties are not entitled to receive the additional compensation provided by Senate Bill No. 198, enacted by the 69th General Assembly, during their present terms of office.

FILED

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August 15, 1957

Honorable William G. Johnson
Prosecuting Attorney , Morgan County
Versailles, Missouri

Dear Mr. Johnson:

Your recent request for an official opinion reads:

"The County Court of Morgan County has requested that I receive an opinion from you as to the effective date of the additional compensation provided for Prosecuting Attorneys in counties of the third class as provided for in Senate Bill No. 198, passed by the 69th General Assembly. I have a letter dated July 8th from the office of Haskell Holman, State Auditor, which says Senate Bill No. 198 will become effective August 29, 1957."

Senate Bill No. 198, enacted by the 69th General Assembly, which bill becomes effective August 29, 1957, reads:

"Section 1. The prosecuting attorney in counties of the third and fourth classes, in addition to the compensation provided in sections 56.280 and 56.290, 56.300, and 56.305, RSMo, shall receive eight hundred dollars in 3rd class counties and six hundred dollars in 4th class counties per year, as compensation for the additional services performed by him in relation to aid to dependent children as provided in section 208.040 RSMo."

Section 13 of Article VII of the Missouri Constitution, 1945, reads:

Honorable William G. Johnson

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

In the case of Little River Drainage Dist. v. Lassater, 29 SW2d 716, at l.c. 719, the Missouri Supreme Court stated:

"The constitutional inhibition only applies to compensation or fees of officers for performing duties incident to their offices, and has no application to additional duties imposed upon such officers not ordinarily incident to their offices. * * *"

It will be noted that the compensation provided by Senate Bill No. 198, enacted by the 69th General Assembly, is for "the additional services performed by him (the prosecuting attorney) in relation to aid to dependent children as provided in Section 208.040 RSMo."

That portion of the law (§208.040, RSMo, Cum. Supp. 1955) under consideration here, which relates to the duties of the prosecuting attorney, reads:

" * * * When any report is made to the prosecuting attorney of the desertion or nonsupport of a child for whom benefits are claimed, and the whereabouts of the deserting or defaulting parent is known, or can be ascertained, it shall be the duty of the prosecuting attorney to fully investigate all the facts concerning the desertion or nonsupport and institute such action as he deems necessary to secure support for such child. If the prosecuting attorney determines for any reason that an action should not be instituted, a report of his findings and the reason an action would not be instituted shall be made to the Division of Welfare. * * *"

Therefore, all of the prosecuting attorneys who are in office on August 29, 1957, the effective date of Senate Bill No. 198, had had imposed upon them at the time they took office the duties set forth above enacted by House Bill No. 107 in 1955.

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The 69th General Assembly repealed Section 208.040, Laws of 1955, and re-enacted the section which is now Section 208.040 of House Bill No. 69, which becomes effective on August 29, 1957. That portion of the bill which relates to the duties of the prosecuting attorney reads:

" * * * When any report is made to the prosecuting attorney of the desertion or nonsupport of a child for whom benefits are claimed, and the whereabouts of the deserting or defaulting parent is known, or can be ascertained, it shall be the duty of the prosecuting attorney to fully investigate all the facts concerning the desertion or nonsupport and institute such action as he deems necessary to secure support for such child. If the prosecuting attorney determines for any reason that an action should not be instituted, a report of his findings and the reason an action was not instituted shall be made to the Division of Welfare. * * *"

It will be noted that the duties imposed upon the prosecuting attorney by the laws of 1955 are precisely the same as the duties imposed by House Bill No. 69 of the 69th General Assembly, which bill becomes effective August 29, 1957. Therefore, the compensation which is provided by Senate Bill No. 198 is for duties which were already imposed upon the prosecuting attorneys of the state at the time they assumed office, as we pointed out above, and the repeal and re-enactment of Section 208.040 did not add a single duty or impose a single additional act or responsibility upon prosecuting attorneys.

At this point we would call attention to Section 1.120, RSMo 1949, which reads:

"The provisions of any law or statute which is re-enacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments."

Honorable William G. Johnson

The law of 1955 embraced children under the age of sixteen years. House Bill No. 69, enacted by the 69th General Assembly, embraces children under the age of eighteen years, thus somewhat increasing the potential individual cases with which the prosecutor may have to deal. But, as we have previously stated, the duties of the prosecuting attorney under the latter bill, are precisely what they were in 1955. The fact that these same duties are set forth in a new bill enacted subsequent to 1955 does not make them new duties. We do not believe that this possibility of an increase in duties in this area would affect the situation insofar as the instant question is concerned. Any increase in the population of a county constitutes a potential increase in the duties of the prosecuting attorney, but it would not by reason of that fact be argued that his compensation should be increased.

Certainly, the changing of the age limit from sixteen to eighteen years would not impose on the prosecuting attorneys additional duties which were not incident to their offices as of the date they assumed their present terms of office.

CONCLUSION

It is the opinion of this department that prosecuting attorneys in third and fourth class counties are not entitled to receive the additional compensation provided by Senate Bill No. 198, enacted by the 69th General Assembly, during their present terms of office.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

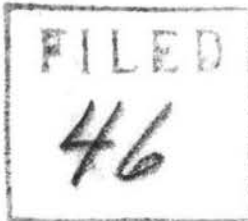
Yours very truly,

JOHN M. DALTON
Attorney General

HFW:lc;ml

CAPITAL ASSETS:
REAL PROPERTY
"USED IN A TRADE
OR BUSINESS."

Whether or not real property is "used in a trade or business" so as to be excluded from the definition of Capital Asset as such is defined in Section 143.-100 (2) Cum. Supp. 1955, RSMo 1949, is a factual determination to be made in each case. Gains and losses from capital assets treated differently under Missouri and Federal law.



October 28, 1957

Honorable Jack C. Jones
Senator Sixteenth District
Carrollton, Missouri

Dear Senator Jones:

In your recent inquiry you submitted several hypothetical situations upon which you desired to have an opinion, as to whether or not the property concerned in each situation constituted a capital asset under the provisions of Section 143.-100 (2) Cumulative Supplement 1955.

You submitted the following situations:

"Situation A: Taxpayer A was engaged in the practice of law. He purchased a dwelling house which he intended to hold as a rental property investment. He held the property for more than six months and sold it.

"Situation B: Taxpayer B was engaged in the insurance business. He purchased a dwelling house which he intended to hold as rental property investment. He held the property for more than six months and sold it.

"Situation C: Taxpayer C was a farmer. He purchased some additional farming land and did not operate it but rented it to others. He held the land for more than six months and sold it.

"Situation D: Taxpayer D was a farmer. Held the farm which he operated for more than six months and sold it."

It is not stated in your letter, but it is presumed that your questions arise because of a lack of understanding of the effect of the changes made in our statute in 1953.

Section 143.100, 1 (2) is as follows:

Honorable Jack C. Jones

"1. * * * The term 'capital assets', as used in this subsection, means property held by the taxpayer (whether or not connected with his trade or business), but does not include * * *.

"(2) Property used in his trade or business, of a character which is subject to the regular allowance for depreciation, or real property used in his trade or business;"

Prior to 1953, our statute permitted capital gains treatment "* * * in any case * * *" where property was held for more than six months. (See prior provisions of Section 143.100-1, RSMo 1949.) Such is not the case now.

It becomes apparent, immediately, that the question of whether or not something is a capital asset requires two or three determinations in the course of arriving at any answer to the question. The first of which seems to be: Is there a "trade or business" involved? Once that is determined it is not difficult, ordinarily, to tell whether or not real property is "used" in it.

We can find no help from precedents of Missouri cases. Because Section 143.200 of our present code provides that the director of revenue may prescribe rules and regulations for the administration of the income tax laws, and because the section also provides that "* * * Such rules and regulations shall follow as nearly as practicable the rules and regulations prescribed by the United States government on income tax assessments and collections," and because the director has prescribed such rules we find some help from a study of the federal cases.

It must be remembered, however, that the federal code, Section 1231 of Title 26 in the 1954 version, contains provisions for throwing "non-capital asset business property" (other than stock in trade, inventories, or property held for sale to customers) with "non-sale or exchange inventory conversions" (other than stock in trade, inventories, or property held for sale to customers) into a hodge-podge, under which any plus figure becomes a capital gain rather than ordinary income. Under that section a loss from the sale of land, buildings, or machinery used in the business, remains the ordinary loss that the other provisions of the chapter on Capital Gains and Losses prescribe, but the gain that would otherwise be ordinary becomes a capital gain. Missouri has no such provision. It certainly is not possible for this state's director of revenue to follow

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the federal regulations in toto just because he must follow them as far as practicable. We need, here in Missouri, to determine only whether or not there was a trade or business, and then determine whether or not the property was used in it. If the property in question was used in it, we cannot treat it as a capital asset.

It is recognized by both federal and state codes (for the State, see Section 143.100-1 which says a capital asset includes property "whether or not connected with a trade or business") and regulations, and by various federal cases, that there can be and is a difference between property "used in a trade or business" and property "held as an investment," or property "held for investment purposes." The 1956 rules and regulations covering the filing of Missouri individual tax returns, on page 13, in speaking of depreciation and depreciable property, states: "This allowance is confined to business or investment property * * *."

Further, under (A), we find the heading "Business Property And Investor's Property. The deduction is allowed on property used in the taxpayer's trade or business and on property held for the production of income, whether or not used in the taxpayer's business. The test relates to the use to which the property is put in the tax year."

The regulations make still other allusions to property which might be used either for business or investment purposes.

Thus, it is evident that the State Department of Revenue recognizes that not all income-bearing property, and not all depreciable property, is necessarily classed as "property used in a trade or business."

In the case of Fackler v. Commissioner, 133 Fed. 2d 509, a 1943 case from the Sixth Circuit Court of Appeals, it was said, l.c. 511:

"The difficulty centers around the problem that petitioner here was engaged in a profession which admittedly occupied all of his business hours, but there is such a thing as carrying on a business through agents which is in fact a common practice. The question is one of degree or 'where to draw the line'."

Honorable Jack C. Jones

In *Commissioner v. Boeing*, 106 Fed. 2d 305, the taxpayer had contracts with a logging company to cut, ship and sell logs from the taxpayer's timber land. The taxpayer received one-third, the logging company two-thirds of the gross sale price. The logs were sold to various purchasers; the title to the logs remained in the taxpayer (owner) until sold by the logging company. The contractor who was engaged to cut, remove and sell the logs was an independent contractor. It was held that the taxpayer was engaged in a "trade or business." The court said:

"* * * The facts necessary to create the status of one engaged in a 'trade or business' revolve largely around the frequency or continuity of the transactions claimed to result in a business status."

There was, of course, involved in the *Boeing* case the question of "property held for sale in the ordinary course of a trade or business." Involved there, too, was the question of an agency relationship, notwithstanding the fact that the contractor was an independent contractor.

The opposite was held, however, in 1955 in the Court of Appeals, Georgia, in the case of *Smith v. Dunn*, 224 Fed. 2d 353. There, under facts similar in many respects, the taxpayer, a practicing architect, turned the problem of liquidating inherited real estate over to a broker. The broker carried out the sale and liquidation as a part of the broker's own business and independently of the taxpayer. The degree of supervision and control retained by the taxpayer could be one main point in distinguishing the cases.

In the case of *Ehrman v. Commissioner of Internal Revenue*, 120 Fed. 2d 607, the heirs of an estate sold land to a corporation which proposed to subdivide and sell the land by lots. For financial reasons, the corporation could not continue. The heirs were forced to re-acquire the land which had been subdivided into lots. Some lots had been deeded to purchasers; some were under contracts of sale. The decision was made to carry on the plans and to sell by lots. That was done. It was held, applying the test of frequency and continuity of actions, as that test was laid down in the case of *Commissioner v. Boeing*, the heirs were engaged in carrying on a trade or business thus the gain was not a capital gain.

In another case, *Kemp v. Murray*, Court of Appeals, Virginia, 1955, 226 Fed. 2d 941, the taxpayer was not in the real estate business and devoted most of his time to his duties as a

Honorable Jack C. Jones

corporation officer. He sold inherited land primarily to provide residential sites for workers in his plant at prices below those obtainable on the market. The profits on the sales were held taxable as capital gains rather than ordinary income.

In the case of Commissioner v. Smith, 203 Fed. 2d 310, Court of Appeals, Second Circuit, Smith claimed as bad debts (business) losses sustained by loans made to a corporation in which he was a twenty per cent stockholder, treasurer and general manager. He had an interest in several other corporations, lent money to them or left dividends or salaries as loans to the corporation. It was held:

"Whether a particular loss or expense is incurred in a taxpayer's trade or business is a question of fact in each particular case."

It was said further:

"The full time management of one's investments does not constitute a trade or business."

Here the case was similar to Bennett v. Clark, 287 U. S. 410, 53 S. Ct. 207, 88 L. Ed. 397, where it was held that an officer and stockholder was not engaged in a trade or business merely because he endorsed corporation notes to protect his investment. It was stated (in the form of dictum):

"If he had been regularly engaged in lending money to business enterprises, bad debt losses resulting therefrom would have been incurred in business."

In Foss v. C.I.R., 75 Fed. 2d 326, the court considered the question of whether lawyers' fees were normal and necessary deductions incurred in carrying on a "trade or business." The court said:

"A person of property who devotes his time to active management of it, and also to active participation in the management of the companies in which his property is invested and who maintains an office for that purpose, where he spends a substantial part of his time, is carrying on business within the meaning of the statute * * *. The line comes between those who take the position of passive investors doing only what is necessary from an

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investor's point of view, and those who associate themselves actively in the enterprise in which they are financially interested and devote a substantial part of their time to that work as a matter of business."

Later, in *Marsch v. C.I.R.*, 110 Fed. 2d 423, 425, it was stated:

"In *Miller v. Commissioner*, 9th Circuit, 102 Fed. 2d 476, 479, it is said:

"The courts have held that where a man takes an active part in the management of an enterprise in which he has investments, his activities amount to the carrying on of a trade or business, but they have drawn a line between such cases and those where the activities are merely looking after investments and doing only what is necessary from an investment point of view. *Bedell v. Commissioner*, 2d Cir. 1929, 30 Fed. 2d 622; *Washburn v. Commissioner*, 8th Cir. 1921, 51 Fed. 2d 949; *Foss v. Commissioner*, 1st Cir. 1935, 75 Fed. 2d 326 * * *."

The court then further quoted from the *Foss* case the last part of the quotation from the *Foss* case above, "The line comes between * * * etc."

In February of 1956, in the Second Circuit, in the case of *Folker v. Johnson*, 230 Fed. 2d 906, the court said that the term "trade or business" as used in the different sections of the Internal Revenue Code should be given the same meaning as far as possible. At l.c. 907, the court stated:

"The phrase 'trade or business', has a common and well understood connotation as referring to the activity or activities in which a person engages for the purpose of earning a livelihood."

In this case the court stated that absent any controlling precedents requiring the contrary conclusion that they would feel constrained to give "trade or business" its more usual broadly inclusive meaning.

In May of 1956, in the Eastern District of Pennsylvania, in *First National Bank of Lansdale v. Smith*, 141 Fed. Supp. 722, at 728, the court said:

Honorable Jack C. Jones

"A reading of the cases which involve the construction of the term 'trade or business' discloses a general proposition of law that it is a question of fact to be determined by the surrounding circumstances of each case as to whether the taxpayer involved is engaged in a trade or business * * *. The general rule is the term 'trade or business,' as used in the I.R.C. in the section involved in this case as well as other sections, bears a restricted meaning which does not include every activity of an individual engaged in for livelihood or profit. * * * Isolated or occasional transactions do not constitute a business, but varied, continuous and regular activities by a taxpayer in a business venture in which he is not only financially interested but to which he devotes a substantial part of his time may make such a venture a business. * * * Kuhn v. Thompson, D.C.E.D. Ark., decided November 13, 1953 (1954 Prentice Hall, par. 72, 358)."

Whether or not the term is given a broad or a restricted meaning, one can certainly see that the answer as to whether or not a trade or business exists depends upon the factual situation in each case.

In *Gilford v. C.I.R.*, 201 Fed. 2d 735, Second Circuit, February 5, 1953, a taxpayer who had an interest in apartments and other rental properties was held to be engaged in "trade or business," through agents, because the court determined that an appreciable amount of time and work was necessarily required on the part of the managing agent, and if such management was a trade or business the taxpayer was so engaged although she acted only through an agent. There the court held that such necessary, regular and continuous activity as maintenance of the rental property in rental condition, the supplying of services for the tenants as were needed to rent them to good advantage, amounted to carrying on a trade or business.

In 1946, the tax court, in 7 T. C. 372, in *Hazard v. Commissioner*, allowed Leland Hazard, a Kansas City practicing attorney, to deduct the entire loss occasioned by the sale of his Kansas City residence as an ordinary loss on the theory that after he left Kansas City and moved to Pittsburgh and rented his old Kansas City residence, that property was "used in the trade or business of the taxpayer."

Honorable Jack C. Jones

Prior to 1942 depreciation was allowable only when property was "used in the trade or business" of the taxpayer. In the case of income-bearing property the commissioner and the courts tended toward allowing depreciation to be taken. Therefore, to do so, they had to hold that income-bearing property is property used in a "trade or business." This case, though decided four years after a change in the federal law, followed that old concept.

Depreciation is now allowed "whether or not" the property is business or investment property. (See the codes and state regulations cited supra.) As can be seen the later federal cases cited herein, do not use so elementary a yard stick as the tax court did in this case. Under what was then 23e of the I.R.C. (now Sec. 165), there was allowed as a deduction, losses sustained during a taxable year and not compensated for by insurance. For individuals this was limited to "losses incurred in a trade or business."

This case might also be explained on a factual basis. Here the factual situation regarding the taxpayer's activities in connection with the rental property, was not reported in detail.

In a 1954 case, N. D. Georgia, *Martin v. United States*, 119 Fed. Supp. 468, in discussing whether or not property was held primarily for sale, the court went into the question of whether or not a business existed. In its "conclusions of Law" in that case it said, l.c. 473:

"* * * the word 'business' as used in the statute means 'busyness'--- it implies that one is kept more or less busy, that the activity is an occupation."

It then cited *Snell v. C.I.R.*, Fifth Circuit, 97 Fed. 2d 891, 892.

See also *Curtis Co. v. Commissioner of Internal Revenue*, 232 Fed. 2d 167, decided in Third Circuit, U. S. Court of Appeals, March 30, 1956, for a comprehensive discussion in both the majority and dissenting opinions on the same point as in the *Martin* case.

It is an obvious conclusion, from the above cited cases, that there is always a considerable questions as to where the line is drawn between the mere managerial attention to investments and activity so regular and continuous and varied as to amount to engagement in a "trade or business." A study of the cases determined only by the tax court indicates that that court

Honorable Jack C. Jones

until quite recently, at least, tended toward the conclusion that any income-producing property is property "used in a trade or business," but the federal appellate courts seem to imply that the property owner must engage, either personally or through agents in the management of his property, and such management must consist of more than the mere attention to his investments before he can be held to be engaging in a "trade or business."

If we apply the test of frequency or continuity and the test of the degree of participation by the taxpayer, as those tests seem to emerge from the majority of the federal court cases, to the situations about which you ask, we must come to the following conclusions in each of the situations you submit.

Situation A. "Taxpayer A was engaged in the practice of law. He purchased a dwelling house which he intended to hold as a rental property investment. He held the property for more than six months and sold it."

It would seem that more facts would be necessary before one could make a determination. It is obvious that one could purchase a dwelling and the lot on which it stands and hold it as investment property only and not take such a part in the management, the care and upkeep of it, with such frequent and continuous and varied activities as to make it amount to a trade or business. But, as seems obvious from the Gilford and Hazard cases cited above, so could he, under a given set of facts, be engaged in a trade or business of renting his investment property, in addition to his profession or in addition to another trade or business.

Situation B. "Taxpayer B was engaged in the insurance business. He purchased a dwelling house which he intended to hold as rental property investment. He held the property for more than six months and sold it."

Situation B is identical to A. See the discussion above.

Situation C. "Taxpayer C was a farmer. He purchased some additional farming land and did not operate it but rented it to others. He held the land for more than six months and sold it."

Honorable Jack C. Jones

The situation here is identical to A and B, with the exception of the additional question as to whether the mere fact that property owned by some taxpayer is of the same kind or character as other property used in his trade or business, is enough to require that all such property so held by the taxpayer be included in the category of "real property used in a trade or business."

We see in the cases of *Burkhard v. U. S.*, 22 Fed. Supp. 23, affirmed in 102 Fed. 2d 643, D.C. California 1938, and *Smith v. C.I.R.*, Court of Appeals, Fifth Circuit, 1956, 233 Fed. 2d 142, that answer to this question is No.

In the *Burkhard* case it was said that a taxpayer may be both a dealer and an investor in real estate at the same time as respects his rights to deduct a loss on an exchange of real property.

In the *Smith* case it was held that one's usual trade or business does not freeze all of his dealings inevitably within the framework of that calling, and he may hold some property primarily for sale to customers in the ordinary course of his trade or business, while holding similar property for other purposes. It would follow that if one can hold property "for sale in the ordinary course of a trade or business" and hold the same kind of property for investment, he could likewise hold property that he "uses" in his trade or business and some of the same kind for investment only. It would likewise follow that if a dealer and an investor in real estate may do so, so may a farmer.

Situation D. "Taxpayer D was a farmer. He held the farm which he operated for more than six months and sold it."

The answer to the question as to whether the land which a farmer is actually farming is "used in a trade or business" certainly seems obvious and clear and above dispute. Such farm is certainly "used in the trade or business" of a farmer.

CONCLUSION

From the above discussion we come to the conclusion that whether or not real property is "used in a trade or business" so as to be excluded from the Missouri statutory definition of Capital Asset is a factual determination to be made in each case; and that because of the differences between federal and state statutory provisions, the state may not by regulation treat gains and losses from the sale of capital assets the same as they are treated under federal law and regulation.

Honorable Jack C. Jones

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Russell S. Noblet.

Yours very truly,

John M. Dalton
Attorney General

RSN/lc/b1

NONINTOXICATING
BEER:
REVOCATION OF
LICENSE:



No person shall be granted a permit or license to sell nonintoxicating beer whose permit or license as such dealer has been revoked or who has been convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, of the violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor or nonintoxicating beer.

January 17, 1957

Honorable Hollis M. Ketchum
Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"May I have your official opinion concerning Sections 312.040 and 312.510 of the Non-Intoxicating Beer Law.

"On August 8, 1956, a 3.2% Non-Intoxicating Beer by Drink licensee was convicted in the Court of Criminal Correction, Division #1, St. Louis, Missouri, and fined \$25.00 and costs for selling 3.2% non-intoxicating beer without a license. Records of this department show that this person's license expired June 30, 1956, and she was arrested July 1, 1956 for sale of non-intoxicating beer without a license. A license was issued July 3, 1956 and she was then convicted August 8, 1956.

"Section 312.510 of the Non-Intoxicating Beer Law reads in part as follows:

"* * * If the person so convicted shall be the holder of any permit or

Honorable Hollis M. Ketchum

license issued pursuant to the provisions of this chapter, such conviction by any court of competent jurisdiction shall, without further proceeding, action or order by any court or by the supervisor of liquor control, operate to revoke and forfeit as of the date of such conviction such permit and all rights and privileges granted thereby, and the holder of such permit shall not thereafter, for a period of one year after the date of such conviction, be entitled to any permit for any person authorized in this chapter. * * * *'

"Section 312.040 of the Non-Intoxicating Beer Law reads in part as follows:

" * * * * and no person shall be granted a permit or license hereunder whose permit or license as such dealer has been revoked, or who has been convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor or non-intoxicating beer * * * *'

"May I be advised if this licensee who has been convicted of a violation of the Non-Intoxicating Beer Law will be eligible for a 3.2% Non-Intoxicating Beer license come August 8, 1957 as set out in Section 312.510 or will this licensee be forever barred from obtaining a 3.2% Non-Intoxicating Beer license as set out in Section 312.040."

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Paragraphs 1 and 2 of Section 312.510, RSMo 1949,
read:

"1. Any violation of any of the provisions of this chapter not otherwise defined, shall be a misdemeanor, and any person guilty of violating any of said provisions, and for which violation no other penalty is by this chapter imposed, shall, upon conviction thereof be adjudged guilty of a misdemeanor and punished by a fine of not less than fifty dollars, nor more than one thousand dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and jail sentence.

"2. If the person so convicted shall be the holder of any permit or license issued pursuant to the provisions of this chapter, such conviction by any court of competent jurisdiction shall, without further proceeding, action or order by any court or by the supervisor of liquor control, operate to revoke and forfeit as of the date of such conviction such permit and all rights and privileges granted thereby, and the holder of such permit shall not thereafter, for a period of one year after the date of such conviction, be entitled to any permit for any person authorized in this chapter."

We here note that the above section was enacted in 1933.

It is a penalty section. The significant part of it, so far as we are here concerned, is the underlined portion in paragraph 2 which, although stated in a somewhat negative manner, holds the promise that if the person involved is otherwise qualified he may, within a year after such conviction as is described, apply for and be entitled to

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any permit for any person authorized by the chapter, 312.

We now turn to Section 312.040, which reads:

"No person shall be granted a permit or license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village nor shall any corporation be granted a permit or license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village; and no person shall be granted a permit or license hereunder whose permit or license as such dealer has been revoked, or who has been convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor or nonintoxicating beer, or who employs in his business as such dealer, any person whose permit or license has been revoked or who has been convicted of violating such law since the date aforesaid; provided, that nothing in this section contained shall prevent the issuance of permits or licenses to nonresidents of Missouri or foreign corporations for the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of nonintoxicating beer, to, by or through a duly licensed wholesaler, within this state."

We here note that this section was enacted in 1941, therefore being a later section than the former. The

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significant part of this section, we believe, is the underlined portion.

This section, in contradistinction to the former section, is a qualification section. It flatly and plainly states that no person shall be granted a permit or license to sell nonintoxicating beer who has been convicted of a violation of any law regarding the sale of intoxicating liquor or nonintoxicating beer since the ratification of the twenty-first amendment. This we believe brings it in direct conflict with that portion of Section 312.510 set forth above, which section states, by implication, that after such a conviction there shall be an automatic revocation of the license and the holder shall not be entitled to receive a permit for a period of one year thereafter. We do not believe that full force and effect can be given to both sections because they are, we believe, mutually repugnant. We have, therefore, to determine which section shall prevail and in this situation we fall back upon the principle of law that where there is an irreconcilable repugnancy between two sections of law the one enacted later in time prevails and repealed by implication the former.

We are aware of the fact that the law does not favor repeals by implication. In the case of *Preisler v. Toberman*, 269 S.W. 2d 753, the Missouri Supreme Court stated, at l.c. 754:

"The 1953 Act contains no repealing clause or provision whatever. 'Repeals by implication are not favored - in order for a later statute to operate as a repeal by implication of an earlier one, there must be such manifest and total repugnance that the two cannot stand; where two acts are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the earlier one by implication; if they are not irreconcilably inconsistent, both must stand.' *Riley v. Holland*, 362 Mo. 682, 243 S.W. 2d 79, 81;

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State ex rel. and to Use of George B.
Peck Co. v. Brown, 340 Mo. 1189, 105
S.W. 2d 909; State ex rel. Boyd v.
Rutledge, 321 Mo. 1090, 13 S.W. 2d
1061."

However, it will be noted that this case does admit the principle of repeal by implication where there is a total repugnancy which we believe to be the case in this case.

In the case of Pogue v. Swink, 261 S.W. 2d 40, at l.c. 43 et seq., the court stated:

"Another principle of law also applies; that is: The rule that where a later act covers the entire subject of a prior act or acts, manifesting a legislative intent that the later act prescribes the law with respect to the subject matter, the later act supersedes the earlier act or acts. The rule is well stated in *Murdock v. City of Memphis*, 20 Wall 590, 616, 87 U.S. 590, 616, 617, 22 L.Ed. 429, where two acts of Congress were under consideration. We quote:

" 'It will be perceived by this statement that there is no repeal by positive new enactments inconsistent in terms with the old law. It is the words that are wholly omitted in the new statute which constitute the important feature in the questions thus propounded for discussion. A careful comparison of these two sections * * * can leave no doubt that it was the intention of Congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best,

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fication of the twenty-first amendment to the Constitution of the United States, of the violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor or nonintoxicating beer.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

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and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform. * * * What is changed or modified is the law as thus changed or modified. That which is omitted ceased to have any effect from the day that the substituted statute was approved.'

"See also Meriwether v. Love, 167 Mo. 514, 517(1), 67 S.W. 250; State ex rel. Gaston v. Shields, 230 Mo. 91, 102, 130 S.W. 298, 300; Hogel v. Lindell, 10 Mo. 483, 488; 59 C.J. 919, § 520; 82 C.J.S., Statutes, § 292, p. 496; 50 Am. Jur. 559, § 556; Crawford, Statutory Construction, 196, § 137; 1 Sutherland, Statutory Construction, 475, § 2018."

We believe, therefore, that no person whose license has been revoked or who has been convicted of a violation of the provisions of Chapter 312 shall be granted a license.

CONCLUSION

It is the opinion of this department that no person shall be granted a permit or license to sell nonintoxicating beer whose permit or license as such dealer has been revoked or who has been convicted, since the rati-

PUBLICATION RATES: Circuit Court en banc in cities of 100,000
PUBLIC ADVERTISEMENTS: population or more has right to set publica-
CIRCUIT COURTS: tion rates at a higher figure than those
COUNTIES OF FIRST CLASS: established in Section 493.080, RSMo. 1949,
Maximum publication rates in counties of the
first class are established by Section 493.030,
Cum. Supp. 1955. Where city of 100,000 population or more located in first
class county, then publication rate for the city is established pursuant
to Section 493.080, supra, and publication rate for county outside the
city is that established by Section 493.030, supra.



March 15, 1957

Honorable Edgar J. Keating
State Senator
Jefferson City, Missouri

Dear Senator Keating:

This is in answer to your opinion request to this office
dated March 9, 1957, which reads as follows:

"I will appreciate it if you will give me an
opinion on the right of the Circuit Court en
banc to fix the rate for public advertising
under Section 493.030, 1955 Supplement.

"This matter may require legislation to clarify
the Court's powers and since the General Assem-
bly will stop introducing legislation March 15th,
I would like to have your opinion as quickly as
possible. I understand that your office has
heretofore rendered an opinion on this subject
concerning the Court en banc in St. Louis City."

Section 493.030, Cum. Supp. 1955, to which you refer in your
opinion request, reads as follows:

"When any law, proclamation, advertisement,
nominations to office, proposed constitutional
amendments or other questions to be submitted
to the people, order or notice shall be pub-
lished in any newspaper for the state, or for
any public officer on account of or in the
name of the state, or for any county or for
any public officer on account of, or in the
name of any county, there shall not be charged
by or allowed to any such newspaper for such
publications a higher rate than three cents
per word for each insertion for all type mat-
ter which is set solid in any one size of type.
When any law, proclamation, advertisement,
nominations to office, proposed constitutional
amendments or other questions to be submitted
to the people, order or notice, require, either
wholly or partially more than one size of type,
or the use of any emblem, or the spacing of

lines so as to have a blank space between the lines, or tabular matter, the rate shall be computed by the square inch of space used, which rate shall not exceed the rate of seventy-five cents per square inch or major fraction thereof for each insertion. As used herein the term 'word' means any letter, figure or group of letters or figures as set apart by a space. In all counties of the first class the maximum established herein shall not exceed five cents per word or one dollar and twenty-five cents per square inch. All laws or parts of laws in conflict herewith, except sections 493.070 to 493.090, are hereby repealed."

(Underscoring ours.)

This section contains two important provisions as far as an answer to your opinion request is concerned. First, it establishes the maximum publication rate for all public advertisements in class one counties. Second, it repeals all of the laws in conflict with the above except Sections 493.070, 493.080, and 493.090, RSMo. 1949. These sections read as follows:

"493.070. Advertisements published in specified newspapers (cities of 100,000 or more).--In all cities of this state which now have, or shall hereafter have, a population of one hundred thousand inhabitants or more, all public notices and advertisements, directed by any court, or required by law to be published in a newspaper, shall be published in some daily newspaper of such city, of general circulation therein, which shall have been established and continuously published as such for a period of at least three consecutive years next prior to the publication of any such notice."

"493.080. Notice of meeting to determine newspaper qualified to be publisher--petitions of newspapers.--In all such cities a board consisting of the judges of the circuit court of such city or of the judicial circuit in which said city is situated, or a majority of them shall on or before the first day of January, 1942, and every two years thereafter, cause to be published in some daily newspaper of said city a notice for at least twenty days announcing and designating the time and place when and where said board shall hold a hearing to determine what newspapers in such cities are qualified to publish public notices and advertisements under the provisions of section

Honorable Edgar J. Keating

493.070; and all newspapers in said cities desiring to publish such public notices and advertisements shall, on or prior to the date of each such hearing, file with the board a petition verified by the affidavit of one of the publishers thereof, that such newspaper has the qualifications set forth in said section and desires to be designated as a qualified newspaper under the provisions of section 493.070, and a majority of the board at such time and place shall determine what newspapers so petitioning are qualified under the provisions of said section and shall make a record thereof and shall file a copy thereof with the clerk of all courts of record within such cities, and thereupon such newspapers shall be deemed and considered by all courts and officers of this state to be qualified under the provisions of said section; provided, however, that there shall not be charged by or allowed to any such newspaper for such publications a higher rate than fifteen cents per line for each insertion, the lines to be two inches long and to be set in type occupying twelve lines to the column inch, fractional lines to be charged and paid for as one line; provided, however, that said petition shall be accompanied by a good and sufficient bond, in a sum to be fixed by said board, conditioned for the correct and faithful publication in said newspaper of all said public notices and advertisements, in manner and form as required by law, and at rates not in excess of the rate fixed herein; provided, further, that the board of judges of any such city, if the board shall deem it in the public interest, shall, in the manner herein prescribed, qualify any daily newspaper of general circulation for the publication of public notices and advertisements at rates higher than the maximum rates herein established, though such newspaper shall not file bond hereunder."

(Underscoring ours.)

"493.090. Public notice or advertisement valid, when.--No public notice or advertisement directed by any court or required by law to be published in a newspaper, in cities of one hundred thousand inhabitants or more, shall be valid unless it be published in a daily newspaper qualified to publish such notices and advertisements under the provisions of sections 493.070 to 493.090."

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Section 493.080, supra, provides that the Circuit Court en banc in cities of 100,000 population or more can, if they deem it in the public interest, qualify any daily newspaper of general circulation for the publication of public notices and advertisements at rates higher than those established for cities of 100,000 population or more by that section.

We call your attention to the fact that in Section 493.030, supra, a specific provision is made to avoid any repeal by implication of Sections 493.070, 493.080 and 493.090. Such being the case, we feel that the legislature definitely intended those sections to remain applicable to public advertisements in cities having a population of 100,000 or more.

CONCLUSION

It is the opinion of this office that in cities of 100,000 inhabitants or more, the circuit court en banc, pursuant to Section 493.080, supra, has the right to set publication rates for said city at a higher figure than those established by said Section 493.080, supra.

It is also the opinion of this office that the maximum publication rates in counties of the first class are established by Section 493.030, supra. Where a city of 100,000 inhabitants or more is located within a first class county, then the publication rate in the city would be that established pursuant to the provisions of Section 493.080, supra, and the rate for the county outside the city would be that established by Section 493.030, supra.

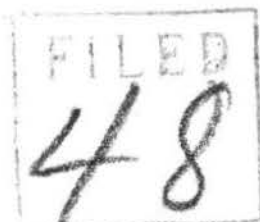
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard W. Dahms.

Yours very truly,

JOHN M. DALTON
Attorney General

RWD/b1

MOTOR VEHICLES:



(1). A trailer owned by a farmer and used by him exclusively in hauling farm products or other property between his farm and town and between farms, where the highways are used, is not exempt from the requirements of Chapter 301, RSMo, with respect to the registration of trailers and the display of license plates thereon. (2). A farm wagon is not a "trailer" for the purposes of registration.

December 9, 1957

Honorable Harry Keller
Representative, 9th District
Jackson County
1205 Linwood Boulevard
Kansas City, Missouri

Dear Sir:

This refers to your request for an opinion concerning the following questions with respect to the licensing of trailers:

- (1). Can a farmer use a trailer, pulled by a farm tractor or automobile, to haul farm products or other property to and from town without obtaining a license?
- (2). Can a trailer be so operated between farms owned by the same farmer without a license?
- (3). Is a farm wagon, when pulled by a farm tractor or an automobile, a trailer for the purpose of licensing?

Under the provisions of Chapter 301, RSMo, the owner of a trailer operated on the highways of this state is required to obtain a license for the trailer, i.e., register the trailer, pay the registration fee, and display a license plate on the trailer. Upon a search of the statutes, we find no provision which makes an exception in the case of a trailer owned by a farmer and used by him solely in hauling farm products or other property between his farm and town, or between two farms, where the highways are used. Accordingly, it is our opinion that in such circumstances, a license must be obtained; and, therefore, we answer your first two questions in the negative.

In discussions with representatives of this office you have referred to a statutory provision making an exception in the case of operations between two farms. The provision which we believe you have had in mind is Section 304.260, RSMo. which relates to the operation of farm tractors, but has no reference to trailers. In this connection, we are enclosing for your information a copy of an opinion

Honorable Harry Keller

furnished by this office to Honorable W. C. Whitlow, on January 21, 1955, which discusses Section 304.260 and other statutory provisions relating to the use of farm tractors.

Turning now to your third question, the terms "trailer" and "vehicle" are defined in Section 301.010, RSMo, for the purpose of registration requirements, as follows:

"(27) 'Trailer,' any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by self-propelled vehicle, except those running exclusively on tracks, including a semitrailer or vehicle of the trailer type so designed and used in conjunction with a self-propelled vehicle that a considerable part of its own weight rests upon and is carried by the towing vehicle.

"28 'Vehicle,' any mechanical device on wheels, designed primarily for use on highways, except those propelled or drawn by human power, or those used exclusively on fixed rails or tracks."
(Underscoring ours.)

In view of the fact that "trailer" is defined as a "vehicle" meeting certain requirements, and the fact that, by definition, "vehicle" is limited to a mechanical device on wheels "designed primarily for use on highways," this office has previously expressed the opinion that a farm wagon is not a "trailer" and is not required to be registered as such. Enclosed herewith is a copy of an opinion furnished by this office to Honorable Max Benne, on April 20, 1954, to this effect.

CONCLUSION

It is the opinion of this office that (1) a trailer owned by a farmer and used by him exclusively in hauling farm products or other property between his farm and town, and between farms where the highways are used, is not exempt from the requirements under Chapter 301, RSMo, with respect to the registration of trailers and the display of license plates thereon, and (2) in accordance with the prior opinion of this office, a farm wagon is not a "trailer" for the purposes of registration.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. John C. Baumann.

Yours very truly,

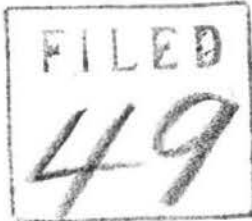
JCB:mw

John M. Dalton
Attorney General

JACKSON COUNTY
HIGHWAY PATROL:

UNIFORMS:

County Court of Jackson County, Missouri,
may purchase and furnish uniforms to mem-
bers of the Jackson County Highway Patrol
so long as the ownership of such uniforms
remains in the county.



February 28, 1957

Honorable J. Marcus Kirtley
County Counselor
Suite 202 Court House
Kansas City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"My attention has been directed to
an opinion of your office under date
of January 9, 1957, holding that the
purchase of uniforms for the Sheriff
and his deputies is not a proper ex-
penditure of the County.

"I would appreciate an opinion as to
the expenditure of such funds for
such purpose in Jackson County, where
the Sheriff's Patrol operates under
authority of House Bill #542 enacted
in 1955, calling your attention par-
ticularly to the language of Section
4 thereof, now Section 57.600."

We note that you refer to our opinion of January 9,
1957, holding that the purchase of uniforms for the sheriff
and his deputies is not a proper expenditure of the county.
Since we do not feel that your question is directed to this
matter we do not feel it necessary to discuss the validity
of this opinion.

Your question, on the contrary, is directed at the
maintenance of the highway patrol of Jackson County, which
patrol was created and authorized by House Bill No. 542
which was enacted by the General Assembly in 1955. We
feel that the county highway patrol of Jackson County is
a body separate and distinct from any other existing in
Jackson County. We note that it shall consist of "a

Honorable J. Marcus Kirtley

superintendent and other officers, sergeants, patrolmen and radio personnel to be known as the county highway patrol."

The sheriff shall provide rules for instruction and discipline and be at the head of this force, which shall be under his exclusive direction.

Your specific question is directed at what is now Section 57.600, RSMo 1949, Cumulative Supplement 1955, which reads as follows:

"All salaries and expenses of members of the patrol and all expenditures for vehicles, equipment, arms, ammunition, supplies and salaries of subordinates and clerical force and all other expenditures for the operation and maintenance of the patrol in the protection of roads and bridges maintained and constructed from the county road and bridge funds, in the regulation of traffic on highways maintained and constructed by the county shall be paid monthly by the county treasurer out of county road and bridge funds at the end of each month by warrant drawn by the county court upon the county treasury."

We note in this section that the county court is authorized to order warrants to be paid by the county treasurer out of county road and bridge funds, at the end of each month, for various items of expenditure of the county highway patrol of Jackson County, among which items is "equipment."

The question now is whether the word "equipment" includes uniforms. As used in this section we believe that it does.

In the case of *Steinfeld v. Jefferson County Fiscal*

Honorable J. Marcus Kirtley

Court, 229 S.W. 2d 319, the Court of Appeals of Kentucky, at l.c. 321 et seq., held:

"It is manifest that the County Court did not abuse its discretion in adopting the regulation of October 26, 1949 and the Fiscal Court had the right to appropriate money for the purchase of the uniforms in question, unless prohibited by KRS 70.560, supra, which question we now will examine.

"KRS 70.560 mandatorily provides that the Fiscal Court shall fix the salaries of the members of the police force, which right and power likewise is preserved in KRS 70.550. Had the Legislature, in enacting KRS 70.560, stopped at this point, we still would have no difficulty in determining that the Fiscal Court inferentially would be required to appropriate such sums as would be necessary to purchase reasonable equipment, including uniforms, for the department. But the Legislature apparently anticipated that some equipment which otherwise could be requisitioned might involve the expenditure of such large sums of money as to embarrass the general fund of the county, if made without regard to other fiscal requirements. It therefore extended the purview of KRS 70.560 and curtailed the otherwise unlimited authority of the County Court under the provisions of KRS 70.550 by leaving the purchase of certain designated types and items of equipment entirely within the discretion of the Fiscal Court. The enumeration of such equipment was not a designation of that referred to in the preceding section

Honorable J. Marcus Kirtley

of the statute. It was a mere lifting of the enumerated types and items of equipment from the sole authority of the County Court and granting to the Fiscal Court the right to refuse to purchase such items even though requested by the County Court. We do not perceive that the granting of discretionary powers to the Fiscal Court in respect to the purchase of the items enumerated in KRS 70.560 infringes on the right of the County Court to requisition these or other items of equipment which it deems necessary for the proper functioning of the police department. The Fiscal Court has the absolute right to reject requisitions for the enumerated items but has no arbitrary discretion in respect to items not enumerated. Since the intention of the Legislature is so clear, we find no place for the application of either the rule or the maxim invoked by appellants.

"Neither are we impressed with the argument that by paying for the uniforms the Fiscal Court has increased the compensation of the police officers. The wearers of the uniforms obtain no property right in them, and use them only as they might use other equipment, furnished for the use of the Department and the benefit of the community which they are employed to serve. A different view might be taken if the officer were presented with the uniform for use or disposition while not engaged in the service of the Department."

In the case of *Edkins v. Board of Education of City of New York*, 287 N. Y. 505, 41 N.E. 2d 75, it was held that under a statute imposing the duty on the board of education to purchase such "equipment" as might be neces-

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sary for the proper and efficient manner of educational activity, the quoted word included protective clothing for child students similar to that furnished by employers to men performing the same machine shop operations in industry.

In the case of Palmer v. Great Northern Railway Company (Mont.), 170 Pac. 2d 768, the court held that safety shoes used by a laborer in railroad shops were "equipment" within the state railroad employers' liability act.

We believe, therefore, that uniforms may be furnished to the Jackson County Highway Patrol so long as the ownership of such uniforms remains in the county of Jackson.

CONCLUSION

It is the opinion of this department that the County Court of Jackson County, Missouri, may purchase and furnish uniforms to members of the Jackson County Highway Patrol so long as the ownership of such uniforms remains in the county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

COUNTY: Not necessary for Presiding Judge of County Court,
COUNTY COURT: Jackson County, Missouri, to sign or indicate his
PURCHASING AGENT: approval on a purchase order.

August 8, 1957



Honorable J. Marcus Kirtley
County Counselor, Jackson County
Suite 202, County Courthouse
Kansas City, Missouri

Attention: Honorable Richard H. Koenigsdorf,
Assistant County Counselor

Dear Sir:

This will acknowledge receipt of your request for an opinion of this Department, which reads:

"The County Court of Jackson County, Missouri, has requested this office to write you for an opinion as to the requirements prescribed for the County Court in authorizing or validating a written order of purchase made by the Purchasing Agent of this county after properly certified to by the Accounting Officer of the county, particularly with reference to the following:

"(1) Is it necessary that the Presiding Judge of this County sign, or in any manner indicate his approval, on a written order of purchase prepared by the Purchasing Agent before such order of purchase becomes valid?

"(2) If your answer to No. 1 is in the affirmative, may the other judges of the County Court authorize a purchase if the Presiding Judge refuses to sign or disapprove an order of purchase of the purchasing agent?

"(3) If your answer to No. 1 is in the negative, what is the requirement for signature

Honorable J. Marcus Kirtley

by any particular official or officers of this county to validate an order of purchase by Jackson County?

"This matter ^{be} is of immediate concern in this county and it would be appreciated if you would give same your earliest possible consideration."

Article VI, Section 7, Missouri Constitution, vests in the county court authority to manage all county business as prescribed by law.

Section 50.753, MoRS Cum. Supp. 1955, created for all first class counties the office of county purchasing agent, and reads:

"There is hereby created in all counties of the first class not having a charter form of government the position of county purchasing agent. The purchasing agent shall be appointed by the county court by order of the court and shall serve at the pleasure of the court, and at such compensation as shall be determined by the court; such purchasing agent shall be entitled to such assistants and employees as the county court shall appoint and at such compensation as shall be determined by the court."

Section 50.755, MoRS Cum. Supp. 1955, further requires all county officials and employees shall make known to the county purchasing agent in first class counties their needs, and it is then the duty of said purchasing agent under the direction of the county court to investigate and determine the actual need for same. Said section reads:

"All county officers, officials or employees, shall make known to the county purchasing agent, as herein provided, any and all requirements that may exist for the purchase of any and all articles needed for the proper conduct or duties of their office or position, and it shall be the duty of such purchasing agent, under the direction of the county court, to investigate and determine if such article or articles are necessary and actually required for the proper conduct of the official business of the county."

Under Section 50.757, MoRS Cum. Supp. 1955, it prescribes the duty of said county purchasing agent which is to purchase necessary

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supplies for the conduct of the county business in all departments and said section reads:

"It shall be the duty of the county purchasing agent to purchase all supplies of whatever kind or nature, necessary for the conduct of the business of the county in all its departments; and the county shall not be liable for any debts except upon the written order of such purchasing agent, which agent shall be required to make purchases only from those offering the lowest price, quality considered, and the purchasing agent is not authorized to purchase supplies of higher quality or price than is reasonably required for the purpose to which they are to be applied."

Section 55.010, MoRS 1949, briefly provides that the county auditor in first class counties as Jackson County, shall also be the budget officer and accounting officer of the county.

Section 55.030, MoRS 1949, further provides that the county auditor shall keep accounts of all appropriations and expenses made by the county court and no warrant shall be drawn or obligation incurred without his certificate to the effect that there remains an unencumbered balance sufficient to pay same. Furthermore, that he shall audit and examine all accounts, demands and claims presented for payment before same shall be allowed or a warrant issued therefor.

You first inquire if it is necessary that the presiding judge of the county court of Jackson County, Missouri, sign, or in any manner indicate, his approval on a written order of purchase prepared by the purchasing agent before such order of purchase becomes valid.

Your request is not as to whether the presiding judge is required to sign a warrant for the payment of such expenditure. The appellate courts have held that to be merely a ministerial duty and that he must affix his signature thereto or he is subject to mandamus.

We understand from your request that said purchase order made by your purchasing agent has been properly certified to by the county auditor of Jackson County, Missouri.

In view of the foregoing statutes creating the office of the county purchasing agent, granting said purchasing agent of said county authority to determine the necessity for any supplies and then directing him to purchase such necessary supplies for the various departments, we believe that it was the legislative intent in enacting

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such statutes to permit said purchasing agent to exercise his discretion with only slight limitations thereon. That such purchase order must, of course, have the certification of the county auditor and that under Section 50.755, supra, the county purchasing agent must determine the necessity for any supplies requisitioned by any county official or employee under the direction of the county court. The words "under the direction of the county court" have seldom been defined by the appellate courts, however, one decision, namely, *Ross v. Long*, 258 N.W. 94, 219 Iowa 471, the court did define such words. In said decision the statute to be construed authorized the conservator of the national bank to act "under the direction of the comptroller" and the court in its decision held that to mean no more than that the conservator shall be subject to the direction of the comptroller, but that it did not require him to secure special authorization from the comptroller before bringing action on ordinary claims against a debtor. In so holding, the court said at l.c. 95:

"[4-6] The federal statute relating to the appointment powers, and duties of a conservator of a national bank provides as follows: 'Whenever he shall deem it necessary in order to conserve the assets of any bank for the benefit of the depositors and other creditors, * * * * the Comptroller of the Currency may appoint a conservator for such bank and require of him such bond and security as the Comptroller * * * * deems proper. The conservator, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such bank and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator shall have all the rights, powers, and privileges now possessed by or hereafter given receivers of insolvent national banks.' Section 203 of the National Act of March 9, 1933, Bank Conservation Act, §203 [12 USCA §203]]. The language of this statute authorizes the conservator under the direction of the Comptroller to take possession of such books, records, and assets of every description, and take such action as may be necessary to conserve the assets of such bank. It also gives the conservator all the rights, powers,

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and privileges given receivers of insolvent national banks. It is the well-settled rule of law that it is part of the duties of a receiver to collect the assets of the bank, and, in pursuance of this authority and duty, he has a right to commence an action for the collection of the securities in his possession. The very purpose of his appointment is to do what his name implies, viz., to conserve the assets of the bank. It is claimed by defendant that, because the statute authorizes the conservator to act under the direction of the Comptroller, it is necessary for him, before commencing an action, to first receive authority therefor from the Comptroller. This language, however, means no more than that the conservator shall be subject to the direction of the Comptroller, and is not intended to require him to secure special authority from the Comptroller before bringing an action on an ordinary claim against a debtor. As conservator, he was the holder of the notes in question, and as such was a proper party. Code §9511; *Turner v. Richardson*, 180 U.S. 87, 21 S. Ct. 295, 45 L. Ed. 438; *National Bank of Metropolis v. Kennedy*, 17 Wall. 19, 21 L. Ed. 554; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 20 L. Ed. 840; *Cadle v. Baker*, 20 Wall. 650, 22 L. Ed. 448."

Under Sections 50.757, 55.030, supra, and Section 50.660, Mo. RS 1949, the only signature required on such purchase orders is that of the county purchasing agent along with the certificate of the county auditor.

CONCLUSION

Therefore, it is the opinion of this Department that it is not necessary for the presiding judge of Jackson County court to sign, or in any manner indicate his approval of, a written order of purchase prepared by the purchasing agent before such order of purchase becomes valid. The only signature required on a purchase order to

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validate same is that of the county purchasing agent, along with the certificate of the county auditor.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH:mw

CORONERS:
CORONER'S INQUEST:
DEAD BODIES:

Coroner has authority to exhume body buried before an inquest when he has reasonable grounds to suspect foul play. Coroner has authority to perform autopsy only if necessary to determine cause of death.



June 12, 1957

Honorable Paul Knudsen
Prosecuting Attorney
Caldwell County
Kingston, Missouri

Dear Mr. Knudsen:

This is in answer to your request for an official opinion from this office which reads as follows:

"I am writing you to request an opinion in reference to the powers of the coroner to have a body exhumed and an autopsy performed on said body when the coroner has reasonable belief by reason of his investigation to suppose that said person died as the result of an attempted illegal operation.

"The facts of this particular case are that on May 23rd of this year a young girl age 23 together with two men entered a doctor's office in this county presumably in good health, and within two to two and one-half hours afterwards she had died in the doctor's office. The doctor signed the death certificate as death caused from coronary thrombosis and did not report the same to the coroner. The girl's parents were notified who in turn had a mortician pick up the body and prepare same for burial. The death occurred on May 23rd and burial was performed on the afternoon of May 25th. Same was never reported to the coroner by the parents nor to the Sheriff's office nor to my office until the evening of Saturday May 25th after the burial at which time inquiries were made from the Sheriff of an adjoining county as to the cause of death. The coroner immediately, together with the Sheriff, conducted an investigation and from their investigation they have strong reason to believe that the girl died as the result of an attempted abortion.

"My inquiry is as to the powers of the coroner in having the body exhumed and a post mortem examina-

Honorable Paul Knudsen

tion made by a pathologist. And also, as to his duties in calling an inquest after burial where he was not called to view the body and the death certificate was signed by the attending physician who is a practicing doctor of osteopathy in this county."

In this opinion we shall assume that the nearest of kin to the deceased have refused to give consent to the exhumation, and that the coroner has reasonable grounds to believe the buried girl came to her death by foul means.

Before answering your question we think it necessary to point out that it is almost universally held that upon interment a body becomes a part of the ground to which it has been committed and is in the custody of the law. Only in cases of the gravest necessity should a body be disinterred. This is made clear in 25 C.J.S. 1020, where it says:

"It is the policy of the law, except in cases of necessity or for laudable purposes, that the sanctity of the grave should be maintained, and that a body once suitably buried should remain undisturbed; and a court will not ordinarily order or permit a body to be disinterred unless there is a strong showing that it is necessary and that the interests of justice require it. However, there is no universal rule applicable, each case depending on its own facts and circumstances; and for a valid reason, upon application by a proper person, the removal of a body will be permitted." (Emphasis ours)

The foregoing, however, does not answer the question whether the coroner has the authority to exhume a body. In Missouri there is no statutory authority expressly authorizing a coroner to exhume a body, furthermore, the courts of Missouri have never decided this problem.

At common law the rule was apparently to the effect that "Where the body has been buried before the coming of the coroner, or before an opportunity has been given for a view by himself and jury, it ought to be exhumed". 13 C.J. 1249. We think, however, that the answer to this question here in Missouri is to be found in our statutes relating to coroners and inquests.

Upon reading these statutes, the conclusion seems inescapable that the presence of the body at every inquest is contemplated. (Emphasis ours)

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Section 58.300, RSMo 1949, provides:

"The coroner shall administer an oath or affirmation to the jurors, in the following form:

"You solemnly swear (or affirm) that you will diligently inquire and true presentment make, how and by whom the person who here lies dead came to his death, and you shall deliver to me, coroner of this county, a true inquest thereof, according to such evidence as shall be laid before you and according to your knowledge."
(Emphasis ours)

The oath required of witnesses at the inquest is set out in Section 58.340, RSMo 1949. That section reads as follows:

"He shall administer to them an oath or affirmation in form as follows:

"You do swear (or affirm) that the evidence you shall give to the inquest, concerning the death of the person here lying dead, shall be the truth, the whole truth, and nothing but the truth."
(Emphasis ours)

Section 58.360, RSMo 1949, relating to the verdict and its form, provides as follows:

"The jury, having viewed the body, heard the evidence, and made all the inquiry in their power, shall draw up and deliver to the coroner their verdict upon the death under consideration, in writing under their hand, and the same shall be signed by the coroner."

Thus, it becomes apparent that if the foregoing statutes are to be complied with, the body must necessarily be present. Section 58.260, RSMo 1949, provides in part that when a person comes to his death by violence or casualty, the coroner shall summon a jury to appear at the inquest and view the body. In our case here, it appears as if the buried girl came to her death by foul means or as the statute says, "by violence."

Therefore, in requiring the presence of the body at the inquest, the statutes we have just cited, impliedly at least, give the coroner the authority to exhume the body upon which the inquest is to be held. We have based the foregoing upon the case of *Sejrup v. Shepard et al.*, Minn. Sup., 275 N.W. 687, decided in 1937, wherein the Supreme Court of Minnesota in interpreting its statutes, which are very similar to ours, held the coroner had the implied authority to exhume a body when he had reasonable grounds to believe the deceased came to his death by foul means.

Honorable Paul Knudsen

In addition, we think that what the court said at l.c. 688 is very applicable to our problem here, and serves as a warning to all coroners. It said:

"We are not unmindful of the duty owed to the dead and the regard which must be had for the feelings of relatives and friends. The disturbance of the resting place of those who have passed on is not a matter to be lightly taken. However, the interest of the state and its citizens in enforcement of the laws must prevail over these considerations when it appears likely that a crime has been committed.

"We do not mean to hold that coroners may ex-hume bodies indiscriminately, even for the purpose of holding an inquest. It might appear that, because of the passage of time or because of other factors tending to destroy the evidences of the cause of death, the inquest would not accomplish its purpose, or sufficient cause for holding the same did not exist, or, because of considerations of public health and welfare, it would not be advisable to permit the exhumation of a dead body. In such cases, or in any other case where a proper showing was made, an injunction to prevent such exhumation should, and undoubtedly would, issue. However, this is not such a situation." (Emphasis ours)

The next problem is whether the coroner has the authority to perform an autopsy upon a body to determine the cause of death. The statutory duties regarding inquests [in Missouri it is a judicial determination whether the coroner will call an inquest, but the inquest and the autopsy itself are not judicial proceedings] which have been imposed upon coroners of the various counties are set forth in Section 58.260, RSMo 1949, which reads as follows:

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the sheriff of the county where the dead body is found, requiring him forthwith to summon a jury of six good and lawful citizens of the county, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

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In construing this statute it has been judicially held that in connection with an inquest a coroner may have an autopsy performed. To this effect see Crenshaw v. O'Connell, Mo. App., 150 S.W.2d 489. However, an autopsy even in such circumstances may not be performed upon the mere whim of the coroner, regardless of his motives, but only when necessary to assist in the determination of the cause of death. Under no circumstances may an autopsy be performed for the mere purpose of determining whether an inquest should be held.

CONCLUSION

It is, therefore, the opinion of this office that if a person is buried before a coroner's inquest determined the cause of death, and thereafter, the coroner has reasonable grounds to believe such person came to his death by foul means, the coroner has the implied authority to exhume the body, if the body has not been interred so long that an autopsy would not disclose the evidence the coroner is seeking.

It is further our opinion that a coroner, in connection with an inquest before a jury, may perform an autopsy upon a body only if it is necessary to determine the cause of death.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George E. Schaaf.

Very truly yours,

John M. Dalton
Attorney General

GES/lc/lc

CRIMINAL LAW: An information that accused crossed yellow line
MOTOR VEHICLES: passing another vehicle in a no-passing zone does
CARELESS DRIVING: not charge the commission of a crime.



January 23, 1957

Honorable Alden S. Lance
Prosecuting Attorney
Savannah, Missouri

Dear Sir:

This office is in receipt of your letter of recent date requesting an official opinion, which letter reads as follows:

"I request that your office render an official opinion to me concerning the question of law involving the manner of operation of motor vehicles in the State of Missouri as indicated by the following facts and circumstances. There has been considerable discussion in my county among the law enforcement officers and the Magistrate Judge as to whether or not a charge of careless and reckless operation of a motor vehicle would be adequately and legally stated by the allegation that 'the driver crossed a yellow line in an area designated as a no passing zone by the Missouri State Highway Commission.' These words would, of course, be preceded by the usual wording of a careless and reckless charge, a copy of which I am enclosing for your use in answering my question.

"Section 304.015 Missouri RS 1949 seems to cover the matter of the Highway Commission's authority to erect signs designating lanes of traffic under certain circumstances, and the same section seems to make it a violation of the traffic code to disobey the instructions given by such signs.

"We seem to have a lot of crossing of yellow lines on the two-lane highways for the purpose of passing other vehicles. Wherever possible, I make my charge read that the pass was made while approaching the crest of a grade or where the vision ahead was obstructed, as provided under Section 304.016

Honorable Alden S. Lance

Missouri RS 1949. Quite often we have areas where the yellow lines have been placed upon the highway by the State Highway Department upon curves which do not obstruct the view ahead. I have been wondering whether the simple charge of crossing the yellow line would be sufficient to sustain a careless and reckless driving conviction?

"I am enclosing a sample copy of the information which would be worded in the manner which has created the question in our minds."

In your letter you enclosed a printed copy of an information which omitting caption and verification reads:

"_____, Prosecuting Attorney, within and for _____ County, in the State of Missouri, upon information and belief, and upon his official oath, informs the Magistrate Court of _____ County, that on or about the _____ day of _____, 19____, at and in said County of _____, & State of Missouri, the defendant _____, did then and there unlawfully and willfully drive and operate a motor vehicle, to-wit: _____, property of _____ upon a public road of the State of Missouri, known as U.S. Highway No. _____ in a careless and imprudent manner, without exercising the highest degree of care, so as to endanger the property, lives and limbs of others using said highway and road, by then and there carelessly and imprudently crossing a yellow line while passing another vehicle in an area designated as a no passing zone by the State Highway Commission."

In the case of State v. Reynolds, 274 S.W. 2d. 514, 1.c. 516, it was stated as follows:

"We do not agree with the State that merely stating the driver unlawfully operated his car in a careless and imprudent manner is good because it follows the wording of the statute. We have set out the rule followed

Honorable Alden S. Lance

by the courts in this state that it is sufficient to frame an information in the words of the statute where the statute describes the entire offense by setting out the facts constituting it. Certainly, the words used by the State in the information before us do not describe the offense charged as was held in *State v. Ball*, supra, cited by the State. If the information had said that defendant operated his car in a careless and imprudent manner in that he was driving at a high rate of speed or was operating it on the wrong side of the road or that he was failing to keep it as near the right-hand side of the road as practicable or any of the other requirements of the statute, and, by so doing, he endangered the property of another or the life or limb of any person, the information would have charged an offense under the law. As the information stands it merely pleads conclusions of law."

Again, at l.c. 515, in the above case the court quoting from the case of *State vs. Maher*, 232 Mo. App. 998, 124 S.W. 2d. 679, 682, said:

"[2] '***** The indictment should state facts which constitute the offense with reasonable certainty so that the defendant may know what he is to answer. He should not have to guess at what he is to defend against or speculate as to the meaning of the allegations in the charge, and this is true in prosecutions for misdemeanors as well as for felonies. The averments should be so clear and distinct and set forth with such precision and fullness that there could be no difficulty in determining what evidence would be admissible under them, and so that the court and jury may know what they are to try, of what they are to acquit or convict the defendant, and so that the record may show, as far as may be, of what the defendant has been put in jeopardy. (Cases cited)."

It is thought that the authority to pass upon what constitutes a hill or curve has not been delegated by law so as to enable the

Honorable Alden S. Lance

employees of the Highway Department or the Highway Patrol to designate hills or curves, where passing a motor vehicle traveling in the same direction would be illegal, by the placement of yellow lines at such places. As the law now stands it is believed that an information cannot be drawn to describe any particular crime under the statutes by referring to yellow lines to sufficiently describe a criminal act. The principle of law deemed relevant here has been declared by our courts in the case of State v. Daugherty, 358 Mo. 734, 216 S.W. 2d. 467, where it is said at l.c. 741, (Mo. Reps.):

"Criminal statutes are to be construed strictly, liberally in favor of the defendant, and strictly against the state, both as to the charge and the proof. No one is to be made subject to such statutes by implication." State v. Bartley, 304 Mo. 58, 263 S.W. 95, 96; State v. Taylor, 345 Mo. 325, 133 S.W.(2d) 336, 341.* * * * *

In light of the preceding discussion it cannot be recommended that prosecution should be instituted by information citing accused with carelessly and imprudently crossing a yellow line while passing another vehicle in an area designated as a "no passing" zone by the State Highway Commission.

CONCLUSION

It is, therefore, the opinion of this office that an information declaring that a person crossed a yellow line while passing another vehicle in an area designated as a no passing zone by the Highway Commission does not sufficiently charge the commission of a crime.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James W. Faris.

Yours very truly,

JWF:mw

John M. Dalton
Attorney General

COUNTY COURTS: Cannot expend county funds for
THIRD CLASS COUNTIES: legal advice.



April 8, 1957

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
Savannah, Missouri

Dear Mr. Lance:

This department is in receipt of your recent request for a legal opinion, reading, in part, as follows:

"1. Does the County Court of a Class III county have authority to expend county funds to employ an attorney other than the Prosecuting Attorney to advise them upon matters of county government?

"2. In the event that the Assessor in a Class III county makes a mistake in transferring figures from the assessment list submitted by his Deputy Assessor to the County Assessment Books, which mistake reduced the assessed valuation of personal property from \$50,000 to \$5,000, and this same mistake had occurred for three years in succession before it was discovered by the authorities, could the owner of the personal property which was assessed be made to pay State and County taxes upon the \$45,000 reduced valuation resulting from the mistake for each of the three successive years?"

Honorable Alden S. Lance

The first question inquires if the county court of a class three county has authority to expend county funds to employ an attorney other than the prosecuting attorney to advise them upon matters of county government.

Section 56.060, RSMo 1949, enumerates the general duties of the prosecuting attorney, and reads as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over three hundred thousand inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

Section 56.070, RSMo 1949, requires the prosecuting attorney to represent the county in all civil suits and to perform certain other duties. Said section reads as follows:

Honorable Alden S. Lance

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before the magistrate courts, when the state is made a party thereto; provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

Section 56.100, RSMo 1949, provides when the prosecuting attorney shall give his written opinion, and to whom, and is as follows:

"The prosecuting attorney shall, without fee, give his opinion to any magistrate court, and to any county court, or to any judge thereof, if required, on any question of law in any criminal case, or other case in which the state or county is concerned, pending before such court or officer."

Section 56.250, RSMo 1949, permits the county courts of third and fourth class counties to employ special counsel in prosecuting or defending any suits by or against the county, and reads as follows:

Honorable Alden S. Lance

"The county courts of all counties in this state of the third and fourth classes may, in their discretion, employ special counsel or an attorney to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties, and may pay to such special counsel or attorney reasonable compensation for their services, such compensation to be fixed by the county court of such county, to be paid out of such funds as the county court may direct; and such counsel or attorney shall be a person learned in the law, and at least twenty-five years of age."

There is no indication of a legislative intent that the words expressed in Sections 56.070 and 56.100, supra, were to be given a technical meaning. Therefore, it must be assumed to be the legislative intent that the language expressed in said sections is to be given its plain or ordinary meaning.

The word "opinion" has been used in both sections, but the word "advise" does not appear in either section. However, since one of the commonly accepted definitions of the word "advise" is to give an opinion, it is believed that the words "advise" and "opinion" are synonymous in meaning and may be used interchangeably. Consequently, where the word "opinion" is used in each of said sections, it would include the meaning of the word "advise." We believe this is substantiated by the following definition of the word "advise" taken from Black's Law Dictionary:

"ADVISE. To give an opinion or counsel, or recommend a plan or course of action; also to give notice. Long v. State, 23 Neb. 33, 36 N.W. 310. To encourage. Voris v. People, 75 Colo. 574, 227 P. 551, 553.

"This term is not synonymous with 'persuade' (Wilson v. State, 38 Ala. 411), or with 'direct' or 'instruct.' Where a statute authorizes the trial court to advise the jury to acquit, the court has no power to instruct the jury to acquit. The court can

Honorable Alden S. Lance

only counsel, and the jury are not bound by the advice. *People v. Horn*, 70 Cal. 17, 11 P. 470. 'Advise' imports that it is discretionary or optional with the person addressed whether he will act on such advice or not. *State v. Downing*, 23 Idaho, 540, 130 P. 461, 462; *Brown v. Brown*, 180 N.C. 433, 104 S.E. 889, 890."

In this connection we direct your attention to the status of a county court and the powers it possesses under provisions of the Missouri Constitution of 1945 and present statutes. A very able discussion on the county court and its powers is given in the case of *State ex rel. Floyd v. Philpot*, 364 Mo. 735, in which the court said at l.c. 744:

"County Courts are not now named among the 'constitutional courts' in which the judicial power of the state is vested (Article V, Constitution of Missouri 1945), but such courts are recognized in the Article treating with 'Local Government,' and they are given authority to 'manage all county business as prescribed by law.' Section 7, Article VI, Constitution of Missouri 1945. The authorities are uniform to the effect that, outside of the management of the fiscal affairs of the county, such courts possess no powers except those conferred by statute. *Rippeto v. Thompson*, 358 Mo. 721, 216 S.W. (2d) 505, 508; *Bradford v. Phelps County*, 357 Mo. 830, 210 S.W. (2d) 996, 999; *Lancaster v. Atchison County*, 352 Mo. 1039, 180 S.W. (2d) 706, 708; *State ex rel. Walther v. Johnson*, 351 Mo. 293, 173 S.W. (2d) 411, 413."

From this excerpt of the opinion, it appears that a county court is no longer a "constitutional court" in which the state's judicial power is vested, and that under applicable provisions of the new Constitution, court decisions, and statutes of Missouri at the present time, a county court is the official body in each county having charge of the management of the county's financial affairs, and such court possesses no powers except those conferred on it by statute.

Sections 56.070 and 56.100, *supra*, confer the right on the county court to request legal advice of the prosecuting attorney in regard to the matters referred to in said sections, which are

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to advise the court generally on questions of law concerning proceedings pending before the court, or matters in which the county is interested, and pay such attorney for his services from county funds. When the court is in need of legal advice in such instances, it may request the prosecuting attorney for same, and it is the duty of the prosecuting attorney to give his free, oral or written opinion to the court upon the matter of inquiry, as provided by Sections 56.070 and 56.100, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

PNC:ml:vlw

Enclosures (2)

COUNTY COURTS:
THIRD CLASS COUNTIES:
MAY EMPLOY
SPECIAL COUNSEL:
WHEN:



When third class county court was advised by prosecuting attorney against legal action to evict tenant of county poor farm, and prosecuting attorney refuses to do anything further to protect the county's rights, and the court thereafter employed special counsel, who filed an ejectment suit to evict tenant, said special counsel and not the prosecuting attorney shall have exclusive control of ejectment suit. Courts action was authorized by Section 56.250, RSMo 1949, and it may allow reasonable compensation to special counsel and other compensation paid from available county funds.

May 28, 1957

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
Savannah, Missouri

Dear Mr. Lance:

This department is in receipt of your recent request for a legal opinion based upon the facts presented in detail, and which may be summarized as follows:

By written agreement, the county court of Andrew County leased the county poor farm for a term of one year ending January 1, 1957, to a tenant for the purpose of conducting a nursing home on such property. As a part of the agreement, the tenant was to accept and board all indigent persons of the county who would ordinarily be maintained at public expense on the poor farm. For the board of such persons, the county court agreed to pay the tenant \$150.00 per month.

At the end of January, 1957, the county court has failed to notify the tenant concerning their intention to let the county poor farm for the coming year. At this time the tenant had been paid \$150.00 by the court, although the lease had expired the first day of the month. The court then requested you as prosecuting attorney to bring legal proceedings to oust the tenant from the county poor farm. In a written legal opinion, you advised the court that for reasons given in said opinion, it would be improper to start legal proceedings, to evict the tenant of the poor farm at that time. It appears that you failed to do anything further in this matter, and then the court consulted a law firm for advice on said matter.

Thereafter the law firm which had been employed by the county court filed an ejectment suit against the tenant of the poor farm.

You have asked for an opinion based upon these facts and the four specific questions asked in the request are:

Honorable Alden S. Lance

"The questions of law upon which I desire your office to render an official opinion are as follows:

"1. On the basis of the facts as set out above, do I have a right as prosecuting attorney, to intervene in the pending litigation as attorney for the county?"

"2. Assuming that the answer to question number one is 'yes', would I then, as prosecuting attorney of the county, have the legal right and authority to assume full control of the litigation on behalf of the county?"

"3. Assuming that the answer to questions numbered one and two are 'yes' would I then have the legal right and authority to dismiss this action on behalf of the county, upon the basis of my belief that it is unwise to pursue the matter at this time?"

"4. On the basis of the facts indicated above, would the county court have the authority to pay the law firm which they have retained out of the county funds for work done by this law firm in connection with the ejectment suit?"

All statutory references herein are to RSMo 1949 unless otherwise specified.

Section 56.060, is in regard to the general duties of the prosecuting attorney, among which are those of commencing and prosecuting all civil and criminal cases in his county, in which the state or county may be concerned, and of defending all suits against the county or state. Said section reads as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or

defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over three hundred thousand inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

Section 56.070 provides that the prosecuting attorney shall prosecute or defend all civil suits in which the county is interested. Said section reads as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before the magistrate court, when the state is made a party thereto; provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of

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any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

Section 56.250 authorizes all county courts of the third and fourth classes of this state to employ special counsel to represent the county in prosecuting or defending any suit in behalf of the county. Your County of Andrew is one of class three and this section applies to it. Said section reads as follows:

"The county courts of all counties in this state of the third and fourth classes may, in their discretion, employ special counsel or an attorney to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties, and may pay to such special counsel or attorney reasonable compensation for their services, such compensation to be fixed by the county court of such county, to be paid out of such funds as the county court may direct; and such counsel or attorney shall be a person learned in the law, and at least twenty-five years of age."

Section 56.060, supra, gives the general duties of a prosecuting attorney; it requires him to represent the county or state in all civil or criminal cases in his county, in which the interest of the county or state is concerned. Section 56.070, supra, is somewhat more specific than Section 56.060, in that it requires the prosecuting attorney to represent his county in all civil suits in which the county is interested. No reference is made to criminal cases in this section.

Both of these sections are general statutes and apply to prosecuting attorneys in all classes of counties in the state. While Section 56.250, supra, does not impose any duties on the prosecuting attorney, it indirectly concerns him, as the section empowers the county court of third or fourth class county to employ special counsel to prosecute or defend any suit in which the county is interested.

In the discretion of the county court, when it is deemed advisable by them, they may employ another attorney to represent the county. When this is done, the prosecuting attorney is thereby relieved of a portion of those duties imposed upon him by

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Sections 56.060 and 56.070, supra.

Section 56.250 is a special statute, and is more in detail than the two former ones. However, according to certain rules of statutory construction, to be presently noticed, all three of these sections shall be read and construed together. In that instance, it will be found they are fully in harmony and that all of them can be given effect.

In the case of *State ex rel Buchanan County v. Fulks*, 296 Mo. 614, among other matters, the court had under consideration the construction and harmonization of two statutes and gave some statutory rules of construction for that situation. At l.c. 626 the court said:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication." [See *Lazonby v. Smithey*, 151 Mo. App 285, 289 and cases cited in *State ex rel. Lashley v. Becker*, 290 Mo. l.c. 620.]"

Again, in the same case one of the issues was that the county court was unauthorized to employ an attorney in a suit in which the interests of the county were involved, since the statutes provided that all such suits should be prosecuted or defended by the prosecuting attorney. In discussing this contention the court said at l.c. 633:

"Another contention is that the court erred in overruling appellant's motion to dismiss this action because it was not brought by the Prosecuting Attorney of Buchanan County, but by private counsel employed by the county court of that county. The prosecuting attorney was repeatedly directed by the county court to bring the suit, but being of the opinion that the collector was entitled to retain the four per cent commissions imposed on delinquent taxpayers by the statute in addition to the \$9000 compensation provided by Subdivision XV supra, he persistently refused to bring suit. In this

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exigency the county court advised with private counsel, and on the last day before the expiration of the three-year period of limitation the court, by an order entered of record, employed Messrs. Strop and Mayer, attorneys, to bring this action, and the petition was filed on February 28, 1915, pursuant to such employment. It was not signed by the prosecuting attorney."

"It is the duty of prosecuting attorneys to commence and prosecute all civil and criminal actions in their respective counties, in which the county or state may be concerned. [Secs. 736 and 738, R.S. 1919.] The county court is the fiscal agent of the county and is charged with the duty and vested with the power to enforce the collection of money due the county, to order suit to be brought on bond of any delinquent and require the prosecuting attorney for the county to commence and prosecute the same. [Sec. 9560, R.S. 1919.] We are of the opinion that when the prosecuting attorney refused to perform his duty, as in this instance, the county court was not shorn of its power to act in the discharge of its duties in the premises, nor required to supinely abdicate its functions. The servant is not greater than his master. The county court was empowered by the statute to order the suit to be brought and to require the prosecuting attorney for the county to commence and prosecute the action. The refusal of the prosecuting attorney to obey the order of the county court created an emergency. The suit must be brought or the county lose a large amount of its revenue. In this emergency we have no doubt the county court had the implied power to employ other counsel to bring the suit; otherwise it would have failed in the discharge of a duty imposed upon it by the statute. Qui facit per alium, facit per se."

"In Wiley v. Seattle, 7 Wash. 576, mandamus proceedings were brought against the mayor of the city to require him to sign an illegal issue of bonds. Neither the legal officers nor the legislative body of the city would assist him or procure counsel for the purpose: Held, that the city was liable for the services

of special counsel employed by the mayor, although the employment of such counsel was contrary to the provisions of the charter. Anders and Hoyt, JJ., dissenting."

"In Spence & Dudley v. Clay County, 122 Ark. 157, 161, the court said: 'Section 6393 of Kirby's Digest provides that the prosecuting attorney shall defend all suits brought against the State or any county in his circuit. Notwithstanding this section of the statute, we held in the case of Oglesby v. Fort Smith District of Sebastian County, 119 Ark. 567, 179, S.W. 178, that the county court, under our Constitution and laws, was empowered to employ other counsel when in its judgment the interest of the county were of sufficient importance to demand it, or in cases where the prosecuting attorney neglects or refuses to perform the duties imposed upon him by the statute or where his other duties are of such a character that he does not have time to properly represent the county.'"

It is readily seen that the court was of the opinion the county court was empowered to employ special counsel to represent the county in the case, and it is believed said ruling is fully applicable to the law and facts involved in the first inquiry of the present opinion request.

It is believed that Section 56.250 is an exception to the rule stated in Sections 56.060 and 56.070. Obviously such an exception is necessary to insure proper legal representation of the county at all times in cases where the county's interests are involved, and cannot be taken care of by the prosecuting attorney.

In all these or similar emergencies it appears that Section 56.250 supra, would apply. It is further believed that it was never the legislative intent for this section to operate as an unlimited grant or license for the county court to employ counsel other than the prosecuting attorney without good and sufficient reasons.

On the other hand, the legislative intent, as shown in the enactment of said section appears to be that the county court, would in its discretion be authorized to employ an attorney other than the prosecuting attorney, when it appeared to the court that for any reason the prosecuting attorney failed or refused to take any or all necessary legal action to protect the interests of the county in any case where the interests of the county were involved, and when requested by the county court.

Honorable Alden S. Lance

In the instant case, assuming that the county court has questioned the legal advice you gave them, and in their judgment, necessity required them to be certain, as to what, if any, legal action could be taken with reference to the protection of the county's rights in the poor farm matter, and assuming further they did not abuse the power granted to them by Section 56.250, supra, it is believed that they were authorized to seek the advice of the St. Joseph law firm, and to employ the law firm to bring an ejectment suit to oust the tenant of the county poor farm.

In view of the foregoing, and in answer to the first inquiry, it is our thought that under the circumstances of the case, you have no right to intervene in the pending litigation mentioned above, as prosecuting attorney of the county.

Apparently the second and third inquiries are based upon the assumption that the first inquiry would be answered in the affirmative. Since the first inquiry is answered in the negative, it is believed to be unnecessary to answer said latter inquiries.

In answer to the fourth inquiry, and for reasons given in discussion of the first inquiry, it is our thought that the county court of Andrew County is authorized to pay the law firm retained by them to represent the county in connection with the ejectment suit, from county funds.

CONCLUSION

Therefore, it is the opinion of this department that when the county court of a third class county was advised against taking any action to evict a lessor of the county poor farm, by the prosecuting attorney, who refused to do anything further in the matter, and believing it to be for the best interests of the county, the county court employed an attorney, other than the prosecuting attorney, to advise them, and to take any appropriate legal action deemed necessary by him in evicting the poor farm tenant, and said attorney subsequently brought an ejectment suit against the tenant of the county property; the entire control of the ejectment suit shall be in said special counsel, and the prosecuting attorney is unauthorized to intervene in the pending litigation. The action thus taken by the county court was authorized by Section 56.250, RSMo 1949, and the court may fix a reasonable compensation for the services of such special counsel, and may order same paid from any available county funds.

The above foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

INSURANCE: Articles of Agreement of Survivors' Benefit Insurance Company.



January 16, 1957

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of January 11, 1957, an examination has been made of an executed copy of the Articles of Agreement of the proposed Survivors' Benefit Insurance Company.

It is the opinion of this office that the Articles of Agreement heretofore referred to fully comply with the provisions of Sections 377.200 to 377.460, RSMo 1949, and the same are hereby approved under the directive contained in Section 377.220, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO:M:hw

ASSESSOR:
ASSESSMENTS:
TAXATION:



In counties of the third and fourth class having a population of less than forty thousand inhabitants, it is discretionary with the assessor as to whether contiguous lots in one ownership are to be assessed as a unit or individually. Further, if in the discretion of the assessor contiguous lots in one ownership are assessed individually, and so entered on the tax books, the assessor would be entitled to a fee of six cents for making each entry.

April 11, 1957.

Honorable Lon J. Levvis
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Mr. Levvis:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"I would like to have your opinion on the following questions:

"1. A and B are partners in the development of subdivisions of land in the City of Mexico. They, with their wives, own all of the lots in a certain subdivision. Houses have been built on three of said lots. The subdivision plat has been duly recorded, and the lots are designated on said plat by numbers in an approved manner. The owners expect to sell many of said lots during the year and they want the County Assessor, in assessing for taxes, to assess said lots as individual lots, so that, later on, they can obtain a proper tax bill for only such lots as shall remain unsold. Audrain County is a county of the third class. Its population is less than 40,000, and the electors of the County have never voted to operate under the provisions of sections 137.215, 137.220, and 137.225 of our present statutes. Therefore, I have concluded and advised, on authority of section 137.230, that sections 137.215, 137.220, and 137.225 have no application to this County. However, the Assessor has insisted to said owners that he is required by law to assess the lots of said subdivision as one tract. Would it be lawful for him to assess said lots individually, and, if so, is it his duty to so assess them, and can he lawfully be required to do so?

"2. If said Assessor should assess individually the lots described in the foregoing question, in which case

Honorable Lon J. Levvis

he would have to make a separate entry for each lot on his real estate tax book, would he be entitled to receive pay of six cents for each of said items or entries?

You first inquire whether the assessor, in performing his duties, may assess, separately, lots in a subdivision which are all owned by the same person or persons, or whether said officer is required to consolidate all such lots owned by the same person or persons in making the assessment.

Section 137.215, RSMo 1949, provides that in assessing property the assessor "shall assess all town lots owned by one person in a square or block into one tract, lot or call, when it is practicable".

Section 137.225, RSMo 1949, provides that the assessor "shall consolidate all lots owned by one person in a square or block into one tract, lot or call".

An opinion of this office to Elton A. Skinner, Prosecuting Attorney of Howard County under date of November 29, 1951, held that said sections did not apply to counties of under forty thousand population, in the absence of an election wherein a majority of the voters vote to adopt said provisions. A copy of said opinion is enclosed herewith. We note that you state that the voters of Audrain County have not voted to operate under the provisions of Sections 137.215 and 137.225. In view of the foregoing, and in the absence of any other statutory provision, we are of the opinion that the assessor is not required to consolidate all town lots owned by one person in a square or block into one tract, lot or call. By virtue of the same reasoning, i.e., the lack of any statutory direction, we are of the opinion that the assessor, in performing his duties, is not required to assess, separately, lots of the subdivision forming one contiguous tract and owned by the same person or persons. Various statutes relating to the assessment of property refer to tracts of land or "town lots". See Sections 137.165, 137.170, 137.235, 137.270, etc. However, we do not understand said reference to require the assessor to assess, separately, lots in a contiguous tract which are owned by the same person or persons.

We have been unable to find a reported Missouri case where the precise question here involved has been ruled upon. However, we direct your attention to the case of Phelps v. Brumback, reported in 107 Mo. App. 16. That case involved the sale of land for taxes. The defendants contended that the sale was invalid for the reason that there was no valid assessment giving rise to a lien in favor of the state. Such contention was apparently

Honorable Lon J. Levvis

based upon the fact that three lots had been assessed together. The assessment in that case was governed by the charter provisions of the City of Kansas City, which the court noted as follows:

"Section 14, Article 5, of the charter requires: 'The assessor shall return on his assessment book of real property, in tabular form, each parcel of real estate subject to taxation, with the description and value thereof, in numerical order as to the lots and blocks, or sections, or subdivisions,' etc. And, 'when any property is not laid off in lots or blocks, the assessor shall describe the same by pertinent description,' etc."

The court in its opinion then stated:

"'It is generally made imperative that separate and distinct parcels of land shall be assessed separately. This is certainly essential where the lands are resident or seated, and in the occupancy of different persons, each of whom has a right to know exactly what demand the government makes upon him.' Cooley on Taxation, 400. But this rule is not imperative where the whole is still owned as one parcel. Cooley on Taxation, 402; Jennings v. Collins, 99 Mass. 29. It seems to have been a mere informality at most. Davis v. McGee, 28 Fed. 867. No error or irregularity in any assessment of land, 'shall in any manner affect or impair the validity of any tax or any sale or other proceeding for their collection.' Sec. 66, art. 5, supra. As the property, the three lots, were held by Orrison when the tax was assessed, and conveyed by him as such to the trustee, and by the trustee to defendants, their assessment as one parcel was, to say the most, a mere irregularity if that under said section 14, supra, and its validity is supported by all the authorities."

We, therefore, conclude that it is discretionary with the assessor as to whether lots in a contiguous tract, owned by the same person or persons, should be separately assessed or consolidated for the purpose of assessment.

You next inquire if the assessor is entitled to receive six cents for each lot or entry, if he does in fact assess individually lots in a contiguous tract owned by the same person or persons.

Honorable Lon J. Levvis

Section 53.130, RSMo Cum. Supp. 1955, relating to the compensation of the assessor provides as follows:

"The compensation of the county assessor in counties of the third class shall be sixty cents per list, and each county assessor shall be allowed a fee of six cents per entry for making real estate and tangible personal assessment books, all the real estate and tangible personal property assessed to one person or to husband and wife to be counted as one name, one half of which shall be paid out of the county treasury and the other one half out of the state treasury. The assessor in counties of the third class shall place the street address or rural route and post office address opposite the name of each taxpayer on the tangible personal property assessment book; provided, that nothing contained in this section shall be so construed as to allow any pay per name for the names set opposite each tract of land assessed in the numerical list."

In the recent case of State ex rel. v. Atterbury, 270 SW2d 399, the Supreme Court in considering this section held that the assessor was entitled to a fee of six cents per entry in making up the real estate book, and that such fee was not limited by the number of names in the tax books. In view of this holding, we are of the opinion that if the assessor in his discretion makes individual assessments of lots contained in a contiguous tract, and owned by the same person or persons, and actually enters such lots separately in the tax books, he would be entitled to a fee of six cents for making each entry.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that, in counties of the third and fourth class having a population of less than forty thousand inhabitants, wherein the provisions of sections 137.215 and 137.225, RSMo 1949, have not been adopted by a vote, it is discretionary with the assessor as to whether contiguous lots in one ownership are to be assessed as a unit or individually.

Honorable Lon J. Levvis

We are further of the opinion that if, in the discretion of the assessor, contiguous lots in one ownership are assessed individually and so entered on the tax books, the assessor would be entitled to a fee of six cents for making each entry.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/ld

enc. Opinion to:
Elton A. Skinner

INSURANCE: Articles of Agreement of Metropolitan
Universal Life Insurance Company

April 12, 1957



Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of April 10, 1957, an examination has been made of an executed copy of the Articles of Agreement of the proposed Metropolitan Universal Life Insurance Company.

It is the opinion of this office that the Articles of Agreement heretofore referred to fully comply with the provisions of Sections 377.200 to 377.460, RSMo 1949, and the same are hereby approved under the directive contained in Section 377.220, RSMo 1949.

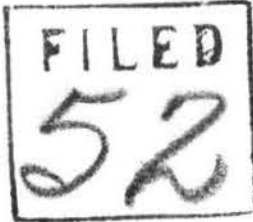
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO:M:hw

ADMINISTRATIVE REVIEW: In cases which are not "contested cases" under Administrative Review Act, hearings should be granted in some instances.



April 17, 1957

Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

Under date of March 6, 1957, you submitted to this office a request for an official opinion, your request being as follows:

"Re: Barker and Jacobs claim for fees in restitution litigation.

"On December 12, 1956, there was filed with me as Superintendent of Insurance an application of John T. Barker and Floyd E. Jacobs for allowance and payment of attorney's fees and expenses for representation of the Superintendent of the Division of Insurance of the State of Missouri. A copy of said application was at the same time forwarded to your office to the attention of Mr. Harry Kay.

"The application recites that it is filed 'to comply with the judgments, opinions, and mandates of the Supreme Court of Missouri' and 'to aver and bring to the official cognizance of said Superintendent the judgments and opinions of the Supreme Court of Missouri in' the two cases decided November 12, 1956 by the Supreme Court docket numbers 44,254 and 44,255.

"I hereby respectfully request your official opinion as to my jurisdiction in this matter to try and determine the application now pending before me."

Honorable C. Lawrence Leggett

The application of Messrs. Barker and Jacobs, referred to in your request, is very lengthy, and hence we will not set it out in haec verba here. The substance of the application is that in June, 1930, with the approval of the Governor and the Attorney General of Missouri, the Superintendent of the Insurance Department employed applicants to institute proceedings against a large number of stock fire insurance companies for restitution of excessive premiums collected and held by said companies in violation of lawful rates; that the terms of the written contract of employment were that if applicants and their associates were successful in recapturing all or any part of the undistributed residue of the excessive premium collections they, the applicants, were to be paid from the recaptured funds for their services and a reasonable contingent fee out of such recaptured funds; that as a result of the efforts of applicants in pursuance of said contract a fund of approximately \$2,751,000.00 was recovered for the benefit of the policyholders who had paid excessive insurance premiums; that the residue of the amount recovered by applicants, to wit, \$2,160,871.32, was paid to the State Treasurer in purported compliance with Section 379.395, RSMo 1949, which said amount, free and clear of all claims of policyholders, now remains in the hands of the State Treasurer; and that the reasonable value of the services of applicants is \$275,000.00.

The applicants pray that you, as Superintendent of the Division of Insurance:

(a) Accept jurisdiction of and recognize their claims and preceding applications merged therein;

(b) Proceed under the Insurance Code and Chapter 536, RSMo 1949, on notice to hear and determine their application and preceding applications praying for an allowance of the claims set forth herein and to hear evidence thereon;

(c) To allow and approve the claims of applicants as expenses of the Insurance Department in a full and adequate amount as may be justified by the evidence;

(d) Determine whether the claims of applicants should be allowed as expenses of "proceedings" against insurance companies involved in the restitution proceedings and assessed against them rateably, or whether same are usual expenses of the Division of Insurance payable out of amounts appropriated by law from the Insurance Division Fund;

Honorable C. Lawrence Leggett

(e) Make an order providing for payment of the sums lawfully allowed applicants, with interest thereon, and that you make such further orders as may be lawful and just in the premises.

The question to be determined is what you shall do with respect to handling and disposing of the claims of Messrs. Barton and Jacobs.

Beginning with the case of State ex rel. v. Hall, 330 Mo. 1107, 52 SW2d 174, it has been uniformly held that the Superintendent of the Division of Insurance is the administrative officer of the state in charge of that office and courts are without authority to interfere with his actions as such officer. State ex rel. v. Dinwiddie, 343 Mo. 592, 122 SW2d 912; Jacobs et al. v. Leggett, 295 SW2d 825 (Mo.); Barker et al. v. Leggett, 295 SW2d 836 (Mo.). In the last cases just cited, the Supreme Court again quoted with approval the following from the case of State ex rel. v. Hall, supra, at 52 SW2d 1.c. 177:

" * * * The original Code and amendments thereto indicate an intention to regulate the business from beginning to end, thereby protecting individual and public interests. The enactment of this comprehensive Code made the state a real party in interest. The superintendent of insurance is the administrative officer in charge of that interest, and courts are without authority to interfere with his administration of the Code."

In view of the above-established principle, the courts have repeatedly refused to allow applicants a fee or to direct the Superintendent of Insurance to allow them a fee. Weatherby et al. v. Jackson, 358 Mo. 542, 215 SW2d 742; Jacobs et al. v. Leggett, supra; Barker et al. v. Leggett, supra.

However, by Section 22 of Article V of the Constitution of Missouri, 1945, it is provided:

"All final decisions, findings, rules and orders of any administrative officer or body existing under the Constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the

Honorable C. Lawrence Leggett

determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record."

As pointed out above, you are an administrative officer of the state. Therefore, if the disposition of the claim of applicants involves a quasi-judicial decision or finding, then such decision or finding would be subject to direct review by the courts in the manner provided by law. So far as we can find, the courts of Missouri have not specifically defined the words "quasi-judicial." They have held certain acts to be quasi-judicial without specifically defining the words. For instance, the Supreme Court, in *State ex rel. v. Thompson*, 85 SW2d 594 (Mo.), was considering certain acts of the State Auditor, and in discussing the case the court said, l.c. 599:

" * * * There is no need to repeat here what was there said and it is sufficient to say as we view the matter now before us, the function and duty to determine and designate the fund upon which he was to draw these warrants, and upon which he did draw them, were quasi judicial and were, respectively, vested in and rested upon the state auditor alone. * * *"

Other courts have defined the words "quasi-judicial" specifically. For instance, in *Adamson v. Minnehaha County*, 293 NW 542 (S. Dak.), the court said, l.c. 543:

"In *Hoyt v. Hughes County*, 32 S.D. 117, 142 N.W. 471, this court said: 'The term "quasi judicial" is used to describe acts, not of judicial tribunals usually, but acts of public boards and municipal officials, presumed to be the product or result of investigation, consideration, and human judgment, based upon evidentiary facts of some sort, in a matter within the discretionary power of such board or officer.' The power committed to the Board of Commissioners by SDC 12.1006 requires the exercise of discretion and judgment in the light of facts revealed by investigation, and is quasi-judicial. * * *"

Honorable C. Lawrence Leggett

Likewise, in State v. Board of County Com'rs of Creek County, 107 P2d 542 (Okla.), the court said, l.c. 549:

" * * * The distinction between the exercise of judicial and quasi judicial power is well stated in Board of County Com'rs v. Cypert, 65 Okl. 168, 166 P. 195, 198, as follows: 'There is a distinction between acts that are quasi judicial and those that are purely judicial. A quasi judicial power is one imposed upon an officer or a board involving the exercise of discretion, judicial in its nature, in connection with and as incidental to the administration of matters assigned or intrusted to such officer or board. * * *"

Since the disposal of the application now pending before you necessarily involves consideration of evidentiary facts and a determination as to how the claims should be paid if they are allowed, it seems to us that you will necessarily act quasi-judicially in making a decision and determination of what should be done with the application. Therefore, your decision and determination will be subject to direct review by the courts as provided by law. In fact, the Supreme Court of Missouri, in the late case of Barker et al. v. Leggett, supra, said at 295 SW2d l.c. 840:

"We believe it is the intent of the insurance code to vest the superintendent with primary jurisdiction to approve the usual expenses and to assess the expenses of proceedings against companies. We believe this right of primary decision by the superintendent is exclusive, subject only to review by the courts in the manner provided in the insurance code or as otherwise provided by Chapter 536, RSMo 1949, V.A.M.S., and more particularly § 536.100 dealing with judicial review of administrative decisions."

We now look to what provisions have been made by the Legislature to review such a decision as the one you are now called upon to make.

In an effort to implement the provisions of Section 22 of Article V of the Constitution, above quoted, the Legislature, in 1945, passed an act to provide for the judicial review of decisions, rules and regulations of administrative officers or bodies existing

Honorable C. Lawrence Leggett

under the Constitution or by law, and to provide for handling of contested cases (Laws of 1945, p. 1504, now incorporated in Chapter 536). The act provided methods for reviewing rules and regulations of various state agencies and also provided for judicial review of a contested case. The act defined a contested case as follows:

"'Contested case' means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by statute to be determined after hearing."

Said act (§536.100, RSMo 1949) provides for a judicial review of a final decision in a contested case, in the following language:

"Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review thereof, as provided in section 536.100 to 536.140, unless some other provision for judicial review is provided by statute; * * *"

It will be seen, therefore, that Section 536.100 and the other provisions of the act of 1945 only refer to a review of decisions in a contested case and for rules of various agencies. We do not find any statute which requires you to hold a hearing before deciding the application now pending before you, and therefore we do not think that the provisions of Section 536.100 would apply to a review of any decision which you may make on the applications.

The Legislature, evidently realizing that it had not made provisions for judicial review of decisions of administrative officers and agencies in cases other than those which it defined as contested cases, in 1953 enacted another act (Laws of 1953, p. 678). Said act, now numbered Section 536.105 of the statutes, reads as follows:

"1. When any administrative officer or body existing under the constitution or by statute or by municipal charter or ordinance shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person, including the denial or revocation of a license, and there is no other provision for judicial inquiry into or review of such

decision, such decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate action, and in any such review proceeding the court may determine the facts relevant to the question whether such person at the time of such decision was subject to such legal duty, or had such right, or was entitled to such privilege, and may hear such evidence on such question as may be properly adduced, and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion; and the court shall render judgment accordingly, and may order the administrative officer or body to take such further action as it may be proper to require; but the court shall not substitute its discretion for discretion legally vested in such administrative officer or body, and in cases where the granting or withholding of a privilege is committed by law to the sole discretion of such administrative officer or body, such discretion lawfully exercised shall not be disturbed.

"2. Nothing in this section shall apply to contested cases reviewable pursuant to sections 536.100 to 536.140.

"3. Nothing in this section shall be construed to impair any power to take summary action lawfully vested in any such administrative officer or body, or to limit the jurisdiction of any court or the scope of any remedy available in the absence of this section."

It will be noted that the later acts specifically provide that it shall not apply to contested cases, that is, cases in which a statute requires that a hearing be had before a decision can be made. It seems apparent, therefore, that the decision which you make on the application of the applicants pending before you will be subject to review by the courts under the provisions of Section 536.105, supra, and not under the provisions of Section 536.100, supra.

We are not unmindful of the language of the Supreme Court in the recent case of Barker et al. v. Leggett, quoted above, wherein

Honorable C. Lawrence Leggett

the court said that a decision by the Superintendent on the claims of applicants would be subject to "review by the courts in the manner provided in the insurance code or as otherwise provided by Chapter 536, RSMo 1949, V.A.M.S., and more particularly §536.100 dealing with judicial review of administrative decisions." What the court was deciding in that case was that, since there were provisions for judicial review of any determination the Superintendent might make as to the claims of applicants, the applicants were not deprived of their rights without due process of law, as they were contending. In disposing of that contention, the court, later in the opinion, said (295 SW2d 1.c. 840):

"The plaintiffs further contend that denial to them of relief in this action is in violation of their rights under the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 10, 13 and 14, Constitution of Missouri 1945, V.A.M.S., in that the obligation of plaintiffs' contract would be impaired and they would be denied due process of law and equal protection of the law by destroying and denying to them any judicial or other remedy to enforce their contract. They also complain that the escheat law passed in 1941 unlawfully operates as an ex post facto for escheat of the fund without any provision for payment of plaintiffs' services.

"As we have pointed out, administrative remedies are provided with right of judicial review. We have considered these constitutional questions and find them to be without merit. * * *

Therefore, the question ruled was that the appellants, applicants here, could obtain a direct judicial review of any decision or determination which the Superintendent of Insurance might make on their claims and it was not necessary to a decision of that case to point out under which particular section of the statutes their review could be obtained. The only thing necessary to decide was whether there were provisions for administrative procedures which were subject to judicial review - not what the mechanics of the procedures were. The statement in the opinion to the effect that the decision by the Superintendent on claims of applicants herein was subject to the provisions of Section

Honorable C. Lawrence Leggett

536.100 was obiter dictum and clearly an oversight. This is understandable because the court was not considering the mechanics of the review provisions, but was only considering the question of whether there were in fact administrative review provisions. The court said that the decision of the Superintendent would be subject to review in the manner provided in the Insurance Code, although there is no provision in the Insurance Code for such a review. This indicates that the court was merely deciding that there were provisions for administrative review and was not undertaking to pick out the particular sections of the statutes which provided for such review.

Therefore, we conclude that, under the provisions of Section 374.220, RSMo 1949, you do have jurisdiction to consider and determine the application now before you. As we have pointed out above, there is no statutory requirement that a hearing for such purpose be held. We think it obvious that the Superintendent is not required to hold a hearing on every claim or question that may be presented to him for determination. However, the circumstances of the present application may be such that denial of a hearing would be considered by a reviewing court to be an arbitrary and unreasonable act. Determination of the procedure is, we feel, primarily a matter within your discretion.

CONCLUSION

It is, therefore, the opinion of this office that you, as Superintendent of the Department of Insurance, do have jurisdiction to consider and pass upon the application of Messrs. Barker and Jacobs now pending before you.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Harry H. Kay.

Yours very truly,

JOHN M. DALTON
Attorney General

HNK:ml

INSURANCE: Articles of Incorporation of Public Life Insurance Company.



May 29, 1957

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of May 27 with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Public Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070 RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1949, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this state and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Malley.

Very truly yours,

John M. Dalton
Attorney General

JLO'M:hw

INSURANCE: Articles of Incorporation of The Missouri Union
Life Insurance Company.



July 8, 1957

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W. H. Ritzenthaler

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of June 19th with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed The Missouri Union Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070 RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1949, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this state and the United States.

The foregoing opinion, which is hereby approved, was prepared by Assistant Attorney General Julian L. O'Malley.

Yours very truly,

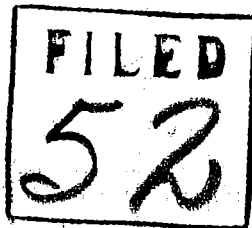
John M. Dalton
Attorney General

By

Robert R. Welborn
Assistant Attorney General

JLO'M:hw

INSURANCE: Articles of Agreement of Preferred Life
and Health Insurance Company.



July 29, 1957

XXXXXXXXXX

W. H. Ritzenthaler

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of July 26, 1957, an examination has been made of an executed copy of the Articles of Agreement of the proposed Preferred Life and Health Insurance Company.

It is the opinion of this office that the Articles of Agreement heretofore referred to fully comply with the provisions of Sections 377.200 to 377.460, RSMo 1949, and the same are hereby approved under the directive contained in Section 377.220, RSMo 1949.

The foregoing opinion, which is hereby approved, was prepared by Assistant Attorney General Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

By
Robert R. Welborn
Assistant Attorney General

JLO'M:hw

INSURANCE: Articles of Incorporation of the Horace Greeley
Life Insurance Company.



August 22, 1957

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of August 20th with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Horace Greeley Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070 RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1949, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this state and the United States.

The foregoing opinion, which is hereby approved, was prepared by Assistant Attorney General Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw

INSURANCE: Proceedings of board of directors and stockholders of American Universal Life Insurance Company, changing from stipulated premium life insurance company to regular life insurance company are in proper, legal form.



September 17, 1957

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of September 17, 1957, transmitting a certified and executed copy of proceedings of the board of directors and stockholders of American Universal Life Insurance Company, Clayton, Missouri, had on September 6, 1957.

A review of the proceedings submitted discloses that American Universal Life Insurance Company, Clayton, Missouri, a stipulated premium plan life insurance company, seeks to accept, pursuant to authority contained in Section 377.450 RSMo 1949, the provisions of Sections 376.010 to 376.670 RSMo 1949, Missouri's regular life insurance company law, and to increase the company's capital stock structure from Twenty-Five Thousand Dollars (\$25,000.00) to One Hundred Thousand Dollars (\$100,000.00).

The proceedings reviewed embrace actions taken by the board of directors and stockholders of American Universal Life Insurance Company, evidenced by the following instruments:

(1) An executed waiver of notice and consent to meeting of board of directors had on September 6, 1957, signed by all directors of the corporation.

(2) Certified copy of minutes of meeting of board of directors of the corporation held on September 6, 1957, disclosing (a) the adoption of a resolution, pursuant to authority contained in Section 377.450 RSMo 1949, to change the organization of said corporation from a stipulated premium plan life insurance company to a joint stock life insurance company, and accepting

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the provisions of Missouri's regular life insurance company law found at Sections 376.010 to 376.670 RSMo 1949; disclosing (b) the adoption of a resolution changing the authorized capital stock of said corporation from the existing total authorized capital stock of Twenty-Five Thousand Dollars (\$25,000.00) represented by one hundred (100) shares with a par value of Two Hundred Fifty Dollars (\$250.00) per share, to a new total authorized capital stock of One Hundred Thousand Dollars (\$100,000.00) represented by one hundred thousand (100,000) shares with a par value of One Dollar (\$1.00) per share, one thousand (1,000) shares of such new One Dollar (\$1.00) par value capital stock to be issued in exchange for each share of Two Hundred Fifty Dollar (\$250.00) par value capital stock presently issued and outstanding; disclosing (c) the adoption of a resolution providing that the entire capital stock of the Company, as changed, shall be fully paid in from existing capital and surplus funds of the Company, in the total amount of One Hundred Thousand Dollars (\$100,000.00); disclosing (d) the adoption of a resolution authorizing the amendment of the Company's Articles of Incorporation to conform to the previous resolutions adopted, and entitling the same as "First Amended Articles of Incorporation of American Universal Life Insurance Company," and providing that a copy of such amended Articles of Incorporation be marked "Exhibit A" and attached to the minutes of the meeting of the board of directors; disclosing (e) the adoption of a resolution directing submission of the proposed First Amended Articles of Incorporation to a meeting of the stockholders of said company to be held immediately after the meeting of the board of directors adopting the resolutions above referred to; disclosing (f) the adoption of a resolution to effect a change in Section 1 of Article VI of the Company's By-Laws by changing the number of members of the board of directors from seven to nine; and disclosing (g) appropriate resolutions giving authority to the board of directors to accomplish all things necessary to carry out the aforesaid resolutions.

(3) Executed copy of proposed First Amended Articles of Incorporation of American Universal Life Insurance Company, dated September 6, 1957.

(4) An executed waiver of notice and consent to the meeting of stockholders of American Universal Life Insurance Company held on September 6, 1957, signed by all of the stockholders of said Company.

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(5) Certified copy of minutes of special meeting of stockholders of American Universal Life Insurance Company held on September 6, 1957, pursuant to resolutions of the board of directors theretofore adopted.

(6) Certificate directed to the proceedings of the board of directors and stockholders of American Universal Life Insurance Company, Clayton, Missouri, had on September 6, 1957, and disclosing a complete list of stockholders and members of the board of directors as of September 6, 1957.

A review of the proceedings outlined above, held by American Universal Life Insurance Company, Clayton, Missouri, held on September 6, 1957, discloses that the same are in proper, legal form.

The foregoing opinion which is hereby approved, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO:M:lw

INSURANCE: Articles of Incorporation of Home Fidelity
Life Insurance Company.



September 18, 1957

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W. H. Ritzenthaler

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of September 16, 1957, an examination has been made of an executed copy of the Articles of Incorporation of the proposed Home Fidelity Life Insurance Company.

It is the opinion of this office that the Articles of Incorporation heretofore referred to fully comply with the provisions of Sections 377.200 to 377.460, RSMo 1949, and the same are hereby approved under the directive contained in Section 377.220, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'N:hw

CORPORATIONS: General business corporation formed under Chapter 351
INSURANCE: RSMo 1949 may not amend Articles of Incorporation so
as to qualify as a joint stock life insurance company
subject to provisions of Sections 376.010 to 376.670
RSMo 1949.



September 19, 1957

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

Your recent request for an opinion from this office presents the following question:

May a corporation formed in 1954 under The General and Business Corporation Law of Missouri, Chapter 351, RSMo 1949, by amendment to its Articles of Incorporation qualify as a joint stock life insurance company subject to the provisions of Sections 376.010 to 376.670 RSMo 1949?

Section 351.020 RSMo 1949 discloses that an insurance company may not be initially formed under The General and Business Corporation Law of Missouri, such statute providing:

"Corporations for profit except banking, insurance, railroad corporations, building and loan associations, saving banks and safe deposit companies, credit unions, mortgage loan companies, union stations, trust companies and exposition companies may be organized under this chapter for any lawful purpose or purposes."

The right of a general and business corporation formed under Chapter 351 RSMo 1949 to amend its articles of incorporation is spelled out in the language of Section 351.085 RSMo 1949, which provides:

"1. A corporation may amend its articles of incorporation, from time to time, in

any and as many respects as may be desired; provided, that its articles of incorporation as amended contain only such provisions as might be lawfully contained in original articles of incorporation if made at the time of making such amendment, and, if a change in shares or an exchange or reclassification of shares is to be made, such provisions as may be necessary to effect such change, exchange or reclassification as may be desired and as is permitted by this chapter.

"2. In particular, and without limitation upon such general power of amendment, a corporation may amend its articles of incorporation from time to time so as

- (1) To change its corporate name;
- (2) To change its period of duration;
- (3) To change, enlarge or diminish its corporate purposes;
- (4) To increase or decrease the number of its directors to not more than twenty-one, nor less than three;
- (5) To increase or decrease the aggregate number of shares or shares of any class which the corporation has authority to issue;
- (6) To increase or decrease the par value of the authorized shares of any class having a par value, whether issued or unissued; provided, that if the par value of issued shares is increased, there shall be transferred to stated capital at the time of such increase an amount of surplus equal to the aggregate amount by which the par value is increased;
- (7) To exchange, classify, reclassify or cancel all or any part of its shares, whether issued or unissued;
- (8) To change the designation of all or any part of its shares, whether issued or unissued, and to change the preferences, qualifications, limitations, restrictions and special or relative rights including convertible rights in respect of all or any part of its shares, whether issued or unissued;

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(9) To change shares having a par value, whether issued or unissued, into the same or a different number of shares without par value, and to change shares without par value, whether issued or unissued, into the same or a different number of shares having a par value;

(10) To create a new class or classes of stock and to define the preferences, qualifications, limitations, restrictions, and the special or relative rights of the shares of such new class or classes."

In treating of the statutory power of amendment which is granted to corporations, we quote the following from Fletcher on Corporations, Perm. Ed., Vol. 7, Sec. 3718, p. 886:

"This granted power of amendment cannot be exercised to change the corporation in such a manner as to make an entirely different kind of a corporation, or to change substantially the objects and purposes of the corporation."

The rule that a corporation may not amend its charter in a material way without statutory authority was forcefully stated in the following language from *Whitehead v. Fire & Lightning Mutual Ins. Co.*, 60 S.W. (2d) 65, 227 Mo. App. 891, 1.c. 895, 896:

"Waiving aside the question as to whether a corporation may re-incorporate, re-charter, or amend, in a material way, its charter without the unanimous consent of its stockholders, the company, in no event, had any right to amend its charter or laws in a material manner without statutory authority and none has been given in our statute, at anytime in its history, to so do, as was attempted in this case. * * * The statute not only did not give such authority but expressly provided that 'no company now organized including only one county can come under the provisions of this article or insure property in an adjoining county.' This is not only provided by the Laws of 1919, page 385, but also by the Laws of 1927,

Honorable C. Lawrence Leggett

page 282, and the present statute. It goes without saying that the attempted amendment of its charter and by-laws undertaken in 1927 and 1931, by the defendant company, in violation of the statute, was of a fundamental, radical and vital character and cannot be tolerated." (Underscoring supplied)

The type of general business corporation with which this particular opinion is concerned is a finance company incorporated "to loan to any person, firm or corporation any of its funds, either with or without security." If the purposes of such a corporation are to be changed to that of "making insurance upon the lives of individuals, and every assurance pertaining thereto or connected therewith, and to grant, purchase and dispose of annuities and endowments of every kind and description whatsoever, and to provide an indemnity against death, and for weekly or other periodic indemnity for disability occasioned by accident or sickness to the person of the insured", such purposes being contemplated by Section 376.010 RSMo 1949, it must be reasonably concluded that a "fundamental, radical and vital character" change is intended by the general business corporation involved. If we are not to look to the basic law of incorporation of this general business corporation for its authority to organize in the first instance as a life insurance company, or for the authority to change its original purposes, where will we go to find such authority? It has been shown in this opinion that Section 351.020 and Section 351.085 RSMo 1949 of The General and Business Corporation Law of Missouri (1) prohibits the formation of insurance companies under such corporation code and (2) allows amendments to charters of such business corporations only if such amendments "might be lawfully contained in original articles of incorporation" of such business corporation.

Attention has been directed to Section 375.030 RSMo 1949, reading in part as follows:

"* * * 2. No company organized under the provisions of this chapter, or any general law of this state, shall undertake any business or risks, except as in this chapter provided; * * *." (Underscoring supplied)

Section 375.030 RSMo 1949, from which the above quotation is extracted, is one of many statutes appearing in Chapter 375 RSMo

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1949, such chapter being entitled "Provisions Applicable To All Insurance Companies." Are we permitted to conclude from the underscored phrase referring to "any general law of this state", appearing in Section 375.030 RSMo 1949, supra, that such reference gives the right to a general business corporation formed under Chapter 351 RSMo 1949 to engage in the life insurance business? It is the opinion of this office that the phrase "any general law of this state" appearing in Section 375.030 RSMo 1949, supra, has reference to any of the general laws of Missouri under which insurance companies may organize and operate.

CONCLUSION

It is the opinion of this office that a corporation formed in 1954 under The General and Business Corporation Law of Missouri, Chapter 351 RSMo 1949, may not, by an amendment to its Articles of Incorporation, qualify as a joint stock life insurance company subject to the provisions of Sections 376.010 to 376.670 RSMo 1949.

The foregoing opinion which I hereby approve was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:hw

INSURANCE: Articles of Incorporation of Missouri Life Insurance Company.



October 11, 1957

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W. H. Ritzenthaler

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of October 9, 1957, an examination has been made of an executed copy of the Articles of Incorporation of the proposed Missouri Life Insurance Company.

It is the opinion of this office that the Articles of Incorporation heretofore referred to fully comply with the provisions of Sections 377.200 to 377.460, RSMo 1949, and the same are hereby approved under the directive contained in Section 377.220, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO:M:hw

INSURANCE: Described contract proposed to be issued by ABC Ambulance Company not an insurance contract subject to regulatory provisions of Missouri insurance code.

October 23, 1957



Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

This opinion construes a contract proposed to be issued by ABC Ambulance Company, with a view to determining if the contract contains covenants and agreements which will cause it to be denominated a "contract of insurance," the offering for sale of which would be in violation of Section 375.310 RSMo 1949 providing a penalty for engaging in the insurance business without proper State authorization. In order that no doubt will exist as to the written provisions of the agreement being construed it is here quoted in its entirety:

"ABC AMBULANCE CO.
of Joplin, Mo.

"Contract and Agreement

"ABC Ambulance Company of Joplin, being the first party, and _____ being the second party, have duly signed this contract and agreement that if ambulance service is needed by the second party, while this contract is in force, and that this service shall include members of his family living at his address and whose names appear on this contract shall be rendered service without additional charge within the city limits and a five mile radius of Joplin and that the party of the first part further agrees to pay upon receipt and verification of ambulance service rendered by any other company anywhere outside of Joplin, up to but not more than this contract while this

Honorable C. Lawrence Leggett

contract is in force which will be _____
years from date signed and that any payment
received for service from any company or
any other party shall be returned to the
party of the second part.

"Signed this _____ day of _____ in the year _____.
Amount _____ for period of _____ years.

Signature - First Party

Signature - Second
Party

Address - Second
Party

Members of family
protected by this
contract and agree-
ment are:

Expressed terms of the above contract are to be augmented
by provisions disclosing that the contract will have a term of
one year with the cost to be five dollars per family.

In State ex rel. Inter-Insurance Auxiliary v. Revelle, 165
S.W. 1084, 257 Mo. 529, 1.c. 535, the Supreme Court of Missouri
spoke as follows:

"The essential elements of a contract of in-
surance are an agreement, oral or written,
whereby for a legal consideration the promi-
sor undertakes to indemnify the promisee if
he shall suffer a specified loss."

The Kansas City Court of Appeals, in Rogers v. Shawnee Fire
Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App.
275, 1.c. 278, spoke as follows:

"Indemnity signifies to reimburse, to make
good and to compensate for loss or injury,
(4 Words and Phrases, p. 3539). Insurance
is defined by Bouvier, 'to be a contract by
which one of the parties, called the insurer,
binds himself to the other called the insured,

Honorable C. Lawrence Leggett

to pay him a sum of money, or otherwise indemnify him."

To summarize the contract in question, we find the company agreeing with the contract purchaser for a period of one year and for a consideration of five dollars to furnish, on behalf of the purchaser and members of his family, any ambulance service required within the city limits of Joplin and a five mile radius thereof, and to further reimburse the contract holder for such service to the extent of five dollars when such services are rendered by any other person or firm outside the area mentioned. That there is an element of risk in the contract for services to be performed in Joplin and within a five mile radius thereof, and a promise of partial indemnity for loss occasioned when services are rendered outside the area mentioned is not to be disputed.

A rule to be applied in this instance is to be gleaned from the following language found in the case of *Jordan v. Group Health Association* (1939), 71 App. D.C. 38, 107 Fed. 2d 239, 247:

"That an incidental element of risk distribution or assumption may be present should not outweigh all other factors. If attention is focused only on that feature, the line between insurance or indemnity and other types of legal arrangement and economic function becomes faint, if not extinct. This is especially true when the contract is for the sale of goods or services on contingency. But obviously it was not the purpose of the insurance statutes to regulate all arrangements for assumption or distribution of risk. That view would cause them to engulf practically all contracts, particularly conditional sales and contingent service agreements."

The contract being construed, viewed in its entirety, appears to have as its dominant feature, services to be rendered on a contingency, rather than a comprehensive risk coverage common to insurance regulated by statute. The line of demarcation in this contract between a contingent service agreement and an insurance risk agreement is sufficiently apparent to resolve the question in favor of a contingent service agreement, and the contract is not to be considered a contract of insurance, issuance of which is regulated by Missouri's insurance code.

Honorable C. Lawrence Leggett

CONCLUSION

It is the opinion of this office that the within described contract, proposed to be issued by ABC Ambulance Company, is not a "contract of insurance" and may be offered for sale without such sale being subject to the regulatory provisions of Missouri's insurance code.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO:M:hw

INSURANCE: Articles of Incorporation of State Farmers
Mutual Casualty Company.



November 6, 1957

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of November 5, 1957, an examination has been made of an executed copy of Declaration of Intention by original incorporators, together with proof of publication of the same, to form an insurance company to be known as State Farmers Mutual Casualty Company. It is noticed that in the Articles of Incorporation, as published, a single reference in Article IV thereof is made to Chapter 378 RSMo 1949. Obviously, this is a typographical error and will not cause the publication to be fatally defective.

With the single exception noted in the preceding paragraph, it is the opinion of this office that the documents referred to above are in conformity with Sections 379.010 to 379.160 RSMo 1949, and not inconsistent with the Constitution and Laws of this State and of the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

John M. Dalton

JLO:M:hw

INSURANCE: Articles of Incorporation of Countryside
Casualty Company.



November 7, 1957

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of November 6, 1957, an examination has been made of an executed copy of Declaration of Intention by original incorporators, together with proof of publication of the same, to form an insurance company to be known as Countryside Casualty Company.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160, RSMo 1949, and not inconsistent with the Constitution and Laws of this State and of the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'N:lmw

INSURANCE:

Articles of Incorporation of Key Life Insurance Company.



November 29, 1957

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of November 27th with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Key Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070 RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1949, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this state and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Malley.

Very truly yours,

John M. Dalton
Attorney General

JLO'M:vlw

TOWNSHIP TAX COLLECTOR: The same person may, simultaneously,
CITY TAX COLLECTOR: hold the office of township tax col-
COMPATIBILITY OF OFFICES: lector and city tax collector in
counties having township organization.



May 2, 1957

Honorable Stephen Lincoln
Representative Harrison County
House Post Office- State Capitol Building
Jefferson City, Missouri

Dear Sir:

This formal opinion is rendered in reply to your letter of April 18, 1957, which reads as follows:

"Will you please advise me if it is legal for one to seek and to hold both the offices of township tax collector and city tax collector in counties with township organization? I have believed that since both offices are on a fee basis it is legal, however, I seek your advice.

"You may have previously rendered an opinion on this. I will thank you to advise me at House Post Office, Jefferson City."

A review of the statutes applicable to township tax collectors, which is Chapter 65, does not disclose any prohibition against a township tax collector serving also as city tax collector in townships with township organization, which law relating to city tax collectors is found in Chapter 94.

Missouri follows the common law doctrine that incompatible offices may not be held by one person at the same time. In the case of State ex rel. Walker v. Bus, 135 Mo. 325, 1.c.338, the Supreme Court spoke, in part, as follows, concerning the common law doctrine:

"At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the

Honorable Stephen Lincoln

duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

No statutory prohibition being found against the same person holding the office of township tax collector and city tax collector, it is the opinion of this department that the same person may, simultaneously, hold both offices.

CONCLUSION

It is the opinion of this department that the same person may, simultaneously, hold the office of township tax collector and city tax collector in counties having township organization.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

RECORDS:
PUBLIC RECORDS:
SCHOOLS:



The public has the right to inspect and copy the contents of the "daily register" required by Section 163.140, RSMo 1949, provided that the exercise of such right does not unduly interrupt the discharge of duties, and the board of education or the superintendent of schools do not have any discretion in permitting or denying such inspection or the right to request a statement of purpose before permitting such inspection.

May 23, 1957

Honorable Stephen M. Limbaugh
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Mr. Limbaugh:

Reference is made to your request for an official opinion, which request reads in part as follows:

"Section 163.140 Revised Statutes of Missouri 1949 provides that the teachers' daily register shall be open to the inspection of the public at all times.

There are two questions confronting the School Board that I would like to have your opinion in connection with. First, do the school officials have the right to require of one who seeks to inspect the school records a statement of his purpose? Second, does the Superintendent of Schools or the Board of Education have any discretion in permitting or denying such inspection?"

Section 163.140, RSMo 1949, to which you refer, reads as follows:

"It shall be the duty of every teacher employed in any of the public schools of the state to keep a daily register, in which the names, ages and date of entrance of the pupils shall be entered, and the studies pursued by the same; the date of each visitation by the directors or other school officers, which register shall be open to the inspection of the public at all times."

Said section provides that the "daily register" shall be open to the inspection of the public at all times. In view of such fact, we are of the opinion that said register constitutes a public record.

Honorable Stephen M. Limbaugh

In the case of State v. Brown, 345 Mo. 430, 134 SW2d 28, 1.c. 31, the court stated:

"If so, such records are 'official' records or public records because the statute requires them to be kept open to public inspection."

Generally, any writing or document constituting a public record is subject to inspection by the public. Disabled Police Veterans Club v. Long, 279 SW2d 220, State ex rel. Cavanaugh v. Henderson, 350 Mo. 968, 169 SW2d 389, and it is not essential that the inspection of public records be limited to persons who have some legal interest to be subserved by the inspection. Disabled Police Veterans Club v. Long, supra.

The General Assembly has the power and authority to grant, by statute, the right of inspection of public records to all persons. 76 C.J.S., Sec. 35(b), p. 135. This the Legislature has seen fit to do in regard to the "daily register", in plain and unambiguous language, which leaves no room for any other construction.

The right to inspect public records carries with it the right to make copies, without which the right to inspect would be practically valueless. Disabled Police Veterans Club v. Long, 279 SW2d 220, State ex rel. v. Williams, 96 Mo. 13, 8 SW 771, 45 Am. Jur., Sec. 15, p. 426.

While we are led to the conclusion that the public has the right to inspect and copy the contents of the "daily register", we do not mean to say that such right is completely unrestricted. On the contrary, such right must be exercised at a proper time and place, and in such manner as will not unduly interrupt or interfere with the discharge of duties. This rule is stated in 79 C.J.S., Schools, Sec. 414, p. 288, as follows:

"This right of inspection is not unqualified or unrestricted, but must be accepted and exercised at a proper time and place, and in such manner as will not unduly interrupt or interfere with the * * * * discharge of official duties".

CONCLUSION

Therefore, it is the opinion of this office that the public has the right to inspect and copy the contents of the "daily register" required by Section 163.140, RSMo 1949, provided that the exercise of such right does not unduly interrupt the discharge of duties,

Honorable Stephen M. Limbaugh

and that the board of education or the superintendent of schools do not have any discretion in permitting or denying such inspection or the right to request a statement of purpose before permitting such inspection.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/ld

CITIES OF THE FOURTH
CLASS:
CITY TAX COLLECTORS:
VACANCIES IN OFFICE:
SPECIAL ELECTIONS:

A special election is required when a vacancy occurs in an elective office in a city of the fourth class more than six months prior to the next general municipal election in such city.



October 30, 1957

XXXXXXX

W. H. Ritzenthaler

Honorable Stephen Lincoln
Member, House of Representatives
Harrison County
Cainsville, Missouri

Dear Mr. Lincoln:

This will acknowledge receipt of your opinion request of October 8, 1957, which reads as follows:

"Mrs. Emma Glaze of Cainsville was elected City Tax Collector at our last spring election and she has decided she does not want the office. She will not resign, however, if it costs the city a special election in order to elect her successor. The City Council and Mayor would like to appoint our Township Tax Collector to the office but our Prosecuting Attorney has advised the Mayor that he believes a special election will be necessary. I will thank you to advise me at your earliest convenience if the Mayor and Council have the power of appointment or if a special election is necessary.

"You gave me an opinion sometime back that one could hold both offices - Township Tax Collector and City Tax Collector - as there is no conflict of interest.

"No politics is involved in election to these city offices in our small town.

"It is a convenience to our tax payers to pay their taxes at one office."

Honorable Stephen Lincoln

The City of Cainsville, Missouri has a population of 618 inhabitants and is one of the fourth class. Research Memorandum No. 5, Committee on Legislative Research, Missouri General Assembly, Revised March 1, 1952.

With respect to cities of the fourth class, it is provided, generally, in Section 79.030, RSMo 1949, that there shall be a general election of elective officers of such cities every two years. It is stated in the opinion request that the city tax collector was elected at "our last spring election." It is, therefore, assumed that the collector was elected in April of 1957 and that, consequently, the term will expire two years later (Section 79.050, RSMo 1949), in April of 1959.

We believe that the law relating to the question in the opinion request is quite clearly set forth in Section 79.280, RSMo 1949. This section reads in part as follows:

"If a vacancy occur in any elective office, the mayor or the person exercising the duties of the mayor shall cause a special election to be held to fill such vacancy, giving at least ten days' notice thereof by publication in some newspaper published in the city, or at least twenty handbills posted up at as many public places within the city; provided, that when any such vacancy occurs within six months of a general municipal election, no election shall be called to fill such vacancy, but the same shall be filled by the mayor or the person exercising the duties of the mayor by appointment;
* * *." (Emphasis supplied)

Although there are no cases construing this section in the light of the question raised in the opinion request, as aforementioned, we believe that the provisions of said section are quite clear in meaning. In examining this section, it is noted that when a vacancy occurs in any elective office, there shall be a special election with the proviso that when the vacancy occurs within six months of a general municipal election, no election shall be held to fill such vacancy. Since a vacancy created by a resignation at the present time would occur more than six months prior to the next general municipal election, it is quite clear that a special election would be required.

Honorable Stephen Lincoln

It is concluded that a special election is required when a vacancy occurs in an elective office in a city of the fourth class more than six months prior to the next general municipal election of such city.

CONCLUSION

It is, therefore, the opinion of this office that if the tax collector of the City of Cainsville, Missouri, a city of the fourth class, resigns at anytime more than six months before the next general municipal election in said city, a special election must be held for the purpose of electing a successor to such office.

The foregoing, which I hereby approve, was prepared by my assistant, Harold L. Henry.

Very truly yours,

John M. Dalton
Attorney General

HLH:hw

COUNTY COURT:
DRAINAGE DISTRICTS:
LEVEE DISTRICTS:

County court does not have authority to remove
or exclude land that is within a drainage or
levee district.



May 27, 1957

Honorable Leon McAnally
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Mr. McAnally:

This is in answer to your request for an official opinion from this office, which reads as follows:

"The County Court has asked me to secure an opinion from your office as to whether the Court has authority to remove certain land from a Drainage District or a Levee District which was organized by the County Court.

"It seems that they have a couple of reasons for wishing to do this if they have the authority. Due to relocation of the levee in one district, part of the land is now in the river, but is still being assessed against the owner. Also, the special benefits assessed against some other land now being in the form of town lots, is so small that the cost of collection of the taxes exceeds the amount of the taxes collected on these lots.

"The County Court wishes to remove from the drainage and levee districts these lands if they have the authority to do so."

Chapter 243, RSMo 1949, and Cum. Supp. 1955, is entitled "Drainage Districts Organized in County Court." It provides, among other things, that "when it shall be conducive to the public health, convenience or public welfare, or when it will be of public utility or benefit, the county court of any county in this state shall have the authority to organize, incorporate and establish drainage districts - - -." These drainage districts are municipal or public corporations, and the county court administers their affairs. The property owners within the districts are taxed to support and maintain them.

Honorable Leon McAnally

In your letter, you stated the county court wanted to remove or exclude certain land that is now within a drainage district because this land has been divided into town lots and the cost of collecting the assessed taxes exceeds the amount of taxes collected on these lots. We shall assume these town lots within the drainage district are being benefited.

The legislature authorized the creation of drainage districts and they get their authority from it. In *Thompson v. City of Malden, C.A.*, 118 S.W. 2d 1059, 1063 (4), the court said:

"(4) Drainage ditches are artificially created and constructed through funds raised by taxation against the lands that comprise the district. Chapter 64, Article 2, R.S.Mo. 1929, creates a code unto itself and the provisions of this chapter and article limit and define the authority and duties of the governing board of drainage districts. *State ex rel. Walker v. Locust Creek Drainage District*, 228 Mo. App. 434, 67 S.W. 2d 840; *State ex rel. Harrison v. Hill*, 212 Mo. App. 173, 253 S.W. 448. Drainage districts organized under the provisions of this chapter and article are public or municipal corporations and the County Court of the county in which they are organized administers their affairs. Their rights, powers and liabilities are specifically limited by the statutes that create them. *State ex rel. Applegate v. Taylor*, 224 Mo. 393, 123 S.W. 892; *Squaw Creek Drainage Dist. v. Turney*, 235 Mo. 80, 138 S.W. 12; *Houck v. Little River Drainage Dist.*, 248 Mo. 373, 154 S.W. 739; *Wilson v. King's Lake Drainage & Levee Dist.*, 176 Mo. Sup. 470, 158 S.W. 931; *Id.*, 257 Mo. 266, 165 S.W. 734; *State ex rel. McWilliams v. Little River Drainage District*, 269 Mo. 444, 190 S.W. 897; *Birmingham Drainage Dist. v. Chicago, B & Q. R. Co.*, 274 Mo. 140, 202 S.W. 404; *Sigler v. Inter-River Drainage Dist.*, 311 Mo. 175, 279 S.W. 50; *Arthaud v. Grand River Drainage Dist.*, 208 Mo. App. 233, 232 S.W. 264."

In 17 Am. Jur. 794, it says:

"Most of the statutes authorizing the organization of districts of the kind under consideration make provision for subsequent alteration of their boundaries, either to take

Honorable Leon McAnally

in outside lands that are being benefited, or to exclude lands that are receiving no benefit. * * *."

Keeping the foregoing in mind, Section 243.130, RSMo 1949, authorizes the county court to condemn additional land not originally acquired by the district; Section 243.140 authorizes the county court to annex land outside the drainage district under certain circumstances; and Section 243.450 authorizes different drainage districts to reorganize and consolidate under certain circumstances. You will note the statute does not authorize the county court to remove or exclude certain land from an existing drainage district. Thus, we hold they cannot.

The second part of your letter concerns levee districts. Section 245.285 through 245.545, RSMo 1949, is entitled "Levee Districts Organized by County Court." After organization by the county court, they become public corporations. A board of directors appointed by the county court administers the affairs of a levee district. The property owners within the district are taxed to support and maintain it.

In your letter, you stated the county court wanted to remove or exclude certain land that is now within a levee district because the levee has been relocated within the district and as a result part of the land within the district is now in the river and still being assessed against the owner.

The legislature also authorized the creation of levee districts and they get their authority from it.

In 52 C.J.S. 1082, it says:

"The legislature may delegate to, or confer on, a levee board power to administer the affairs of the district. Levee and flood control boards and other officers, as well as the districts themselves, have such powers and only such powers, as are conferred by statute either expressly or by necessary implication, including such incidental powers as are necessary to execute the powers specifically conferred or the duties imposed. ***."

The same authority at page 1079 continues:

"Alterations in the territorial extent of levee districts, including the annexation of lands outside the district, are usually provided for by statute. * * *."

Honorable Leon McAnally

Again keeping the above in mind, Section 245.305 provides for incorporating lands into the district which are subject to overflow; Section 245.310 provides for extending the levee or enlarging the district if necessary; and Section 245.400 provides for relocation of the levee under certain circumstances. You will note the statute does not authorize the county court or the board of directors to remove or exclude certain land from an existing levee district. Thus, we hold they cannot.

However, in helping you solve your problem about the levee district, we think it pertinent to call your attention to Sections 245.445 and 245.450. They read as follows:

"245.445. As soon as any levee district shall have been organized, as aforesaid, and in order to defray the expenses of surveys and estimates of levees or other works and costs thereof, maintain and repair the same, and pay such officers, agents, servants and employees as may be entitled to compensation, the said board of directors may order the assessment of a tax on all the lands within the levee district to be benefitted, not to exceed ten mills on the dollar, on the valuation of the benefits thereon by reason of the work proposed or completed as returned by the assessor, and such tax may be assessed and levied for each and every year, and from year to year, whenever the board of directors may, from time to time, determine the same to be necessary; and all such taxes shall be a lien upon the lands in such districts until paid. And whenever said board of directors shall have, by resolution, ordered the assessment of a tax, the secretary of the board, under his official seal, shall cause a certified copy of said order to be transmitted to the clerk of the county court in which said levee district shall be situated, and in case such levee district shall be situated in two or more counties, then to the clerk of the county court of each county in which any portion of said district may be situated; and the said tax shall be extended on the tax books of the county on the real estate to be benefitted, situated in said levee district, in the same manner that other taxes are now extended in a column under the head of 'Levee fund tax,' and shall be collected by the collector of the county in which the real estate is sit-

uated on which the tax is levied, at the same time the state and county taxes are collected, and when said tax shall be collected, the collector shall pay the same over to the treasurer of the county in which the greater portion of said levee district lies. All taxes assessed and levied under the provisions of sections 245.285 to 245.545, shall be collected in the same manner as provided by the general revenue law of the state for the collection of state and county revenue. All taxes not collected shall be returned delinquent at the same time and in the same manner as provided by the general revenue laws for the return of delinquent tax lists, and all writs for delinquent taxes assessed and levied, as aforesaid, shall be prosecuted in the name of the state of Missouri, at the same time, in the same manner and with like effect as writs are prosecuted under the general revenue laws of the state relating to the collection of delinquent and back taxes."

"245.450. After the formation of any levee district under the provisions of sections 245.285 to 245.545, the county court of the county in which such district lies, or when it lies in two or more counties, the county court of each county in said district, shall cause the county assessor of their respective counties composing said levee district, at the first annual assessment to be made under the general revenue laws of the state, to assess the value of all lands in said levee district subject to overflow or inundation or endangered or liable to be endangered by bank erosion or wash from rivers, and to be benefited by said work, having reference to the value of said lands without the work contemplated by sections 245.285 to 245.545, and shall assess the value thereof as improved by said work, in an assessment book to be provided for that purpose."

You will note these sections provide for an assessment of a tax on all the lands within the levee district to be benefited. The Supreme Court in State v. Three States Lumber Co., 198 Mo. 430, 95 S.W. 333, 335, has the following to say about this assessment:

Honorable Leon McAnally

"A further contention is that it was the duty of the assessors to assess the value of all, not part, of the lands in the levee district subject to overflow, etc., which they failed to do, and assessed only such lands as they thought would be benefited. It would have served no useful purpose to assess the value of lands in the district which would not be benefited and could not be taxed for levee purposes, nor does the statute contemplate any such thing; so that it makes no difference that several thousand acres of land, not benefited by the levee although in the levee district, were not assessed.

"Section 8437, Revised Statutes 1899, says that the taxes shall be extended on the tax book of the county on the real estate to be benefited, situated in said levee district, clearly implying that there may be lands in the district not assessed because not benefited. * * *."

From the foregoing, it follows that if lands within the levee district are under water and are not benefited by the levee, they should not be assessed for purposes of paying a tax to the levee district.

CONCLUSION

It is, therefore, the opinion of this office that the county court does not have the authority to remove or exclude land that is within a drainage district; and that the county court and the board of directors of a levee district do not have the authority to remove or exclude land that is within a levee district.

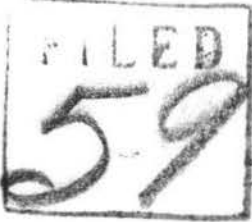
It is further our opinion that if land within a levee district is receiving no benefit from the levee, it should not be assessed for purposes of paying a tax to the levee district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, George E. Schaaf.

Yours very truly,

John M. Dalton
Attorney General

PROBATE LAW: Where nieces and nephews of an intestate inherit from
DESCENT AND him they will take in their own right per capita in
DISTRIBUTION: accordance with Section 474.020, RSMo Cum. Supp. 1955.



January 29, 1957

Honorable Henry H. McNabb, Jr.
Prosecuting Attorney
Butler, Missouri

Dear Mr. McNabb:

This office has received a request for an opinion from you which, in part, reads:

"An intestate had two brothers, both of whom, together with their spouses, predeceased the intestate. One brother left two children surviving him and the other left three children surviving. Do these neices and nephews take in equal parts or per stirpes?"

Section 474.020, Laws Mo. Cum. Supp. 1955, is as follows:

"When several lineal descendents, all of equal degree of consanguinity to the intestate, or his father, mother, brothers and sisters, or his grandfathers, grandmothers, uncles and aunts, or any ancestor living and their children, come into partition, they shall take per capita, that is, by persons; where a part of them are dead, and part living, and the issue of those dead have a right to partition, such issue shall take per stirpes; that is, the share of the deceased parent."

It is noted that the above quoted section differs only slightly to the section contained in RSMo 1949, as Section 468.030. The difference is that the new section says "or his grandfathers, grandmothers," the former section was "or his grandfather, grandmother." It can be seen that this difference does not affect the question here posed. It is thought best to here quote from the case of Aull v. Day, 133 Mo. 337, at l.c. 344, 345:

Honorable Henry H. McNabb, Jr.

"Under this section the nephews and nieces of the ancestor, Mrs. Pomeroy, took their interest in her estate per capita, and the greatnephews and nieces took per stirpes. This construction was given to the statute in Copenhaver v. Copenhaver, 78 Mo. 58, in which the court says: 'While this section is somewhat confused by the multiplication of words, we think it is quite evident that it conveys the idea that when several lineal descendants all of equal degree of consanguinity to the intestate come into partition, as in this case, with others of a more remote degree, that the former take per capita and the latter per stirpes. So that in the case before us, as made by the agreed statement, the result would be, that the nephews and nieces would take in their own right, per capita, and the grand-nephews and grandnieces would take by representation, or per stirpes.'"

This, we feel, definitely shows that the nieces and nephews will take per capita rather than per stirpes.

CONCLUSION

Therefore, it is the opinion of this office that where nieces and nephews of an intestate inherit from him they will take in their own right per capita in accordance with Section 474.020, RSMo Cum. Supp. 1955.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James W. Faris.

Yours very truly,

JWF:mw

John M. Dalton
Attorney General

SCHOOL DISTRICTS:
TAXATION:
PERSONAL PROPERTY:

A property owner who resided in one school district on January 1, 1957, and moved to another school district in the same county prior to the date of assessment, is liable for personal property taxes in the school district in which he resided on the date of actual assessment.

May 9, 1957



Honorable Roy W. McGhee
Prosecuting Attorney
Wayne County
Greenville, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"A property owner who resided in one school district in this county on January 1, 1957 and who moved to another school district in the same county prior to the date of actual assessment is liable for personal property taxes in which of the two school districts?"

On April 17, 1957, following, in response to a letter of ours you wrote as follows:

"Thank you for your letter of April 12 and enclosures relative to my recent request for an opinion concerning a personal property assessment question.

"The enclosures which you forwarded are very informative but I am afraid they do not answer the question which I propounded. My problem is one of date or time rather than place. To rephrase the question: Is personal property to

Honorable Roy W. McGhee

be assessed on the basis of the owner's residence as of January 1 or on residence as of the date of actual assessment?"

We believe that the law on this point is set forth in Section 165.083, RSMo 1949, which reads:

"Upon receipt of the estimates of the various districts, the county clerk shall proceed to assess the amount so returned on all taxable property, real and personal, in each district, as shown by the last annual assessment for state and county purposes, including all statements of merchants in each district of the amount of goods, wares and merchandise owned by them and taxable for state and county purposes; provided, the levy thus extended shall not exceed in any one year the following rates on the hundred dollars assessed valuation; for sinking fund, forty cents; for interest fund, the number of cents necessary to produce the amount required to pay the interest on the bonded debt of the district; for other funds, eighty-nine cents in the city of St. Louis, one dollar in other districts formed of cities and towns, sixty-five cents in all other districts, and such additional rate or rates in each case as may have been legally authorized by the qualified voters of the district; all of which shall be extended by the county clerk upon the general tax books of the county for said year in separate columns arranged for that purpose; and the county clerks shall list the names of all persons owning any personal property who do not reside in any school district, and the value thereof; also, list all lands and town lots in any territory not organized into a school district, and shall levy a tax of sixty-five cents on the hundred dollars valuation on all such taxable property, said taxes to be collected as other taxes and distributed as provided in section 161.030, RSMo

Honorable Roy W. McGhee

1949; and it shall be the duty of the county assessor in listing personal property to take the number of the school district in which the taxpayer resides at the time of making his list, to be by him marked on said list, and also on the personal assessment book, in columns provided for that purpose. (R.S. 1939, §10395, A.L. 1945, p. 1629)"
(Emphasis ours.)

The only apparent purpose of the underscored provision is to establish in which school district the personal property of each taxpayer is taxable. Under Section 165.083, it is the duty of the county assessor in listing personal property to take the number of the school district "in which the taxpayer resides at the time of making his list." It would seem that this language was perfectly plain. Furthermore, nothing has been found elsewhere in the statutes which could be construed to repeal, supersede, or be in conflict with Section 165.083, supra.

CONCLUSION

It is the opinion of this office that a property owner who resided in one school district on January 1, 1957, and moved to another school district in the same county prior to the date of assessment, is liable for personal property taxes in the school district in which he resided on the date of actual assessment.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:vlw

PUBLIC WORKS:
PUBLIC BUILDINGS:
PREVAILING WAGE LAW:

A specification of the prevailing hourly rate of wages in the locality for each craft or type of workman needed to execute a state public works contract, including the prevailing rate for legal holiday and overtime work, either in the publication of the proposed state improvement or in the plans, specifications and conditions governing the details of the proposed contract, would fully comply with the requirements of House Bill No. 294 enacted by the 69th General Assembly and requiring such specification in the "call for bids."



November 18, 1957

Honorable Ralph McSweeney
Director
Division of Public Buildings
Capitol Building
Jefferson City, Missouri

Dear Mr. McSweeney:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"I will appreciate an opinion from your office regarding the proper form for advertising for bids on State work to Comply with the Prevailing Wage Law, Enacted 1957 Session General Assembly, Effective August 29, 1957 (Chap. No. 290, Section 210 through 310 RSMo.)."

After further consultation with you, we understand the precise question to be whether or not the advertisement for bids must contain a detailed statement of prevailing hourly rate of wages, including holiday and overtime, in the locality for each craft or type of workman needed to execute the contract.

Section 8.250, RSMo 1949, provides that no contract shall be made by an officer of this state or any board or organization existing under the laws of this state having the expenditure of public funds or moneys provided by appropriation from this state, in whole or in part, or raised in whole or in part by taxation for the erection or construction of any building, improvement, alteration or repair, the total cost of which exceeds the sum of \$10,000 "until public bids therefor are requested or solicited by advertising" for a specified length of time in designated newspapers.

The purpose of enactments such as Section 8.250, supra, is to secure competitive bidding on the part of intending contractors

Honorable Ralph McSweeney

to the end that the public is protected from collusive contracts, favoritism, fraud, extravagance and to the end that public contracts may be secured at the lowest cost to the taxpayers. 43 Am. Jur., Public Works in Contracts, Sec. 26, p. 767.

The 69th General Assembly adopted what may be termed a prevailing wage on public works law, House Bill No. 294. Section 2 of said bill declares the purpose of said law as follows:

"It is hereby declared to be the policy of the state of Missouri that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed, shall be paid to all workmen employed by or on behalf of any public body engaged in public works exclusive of maintenance work."

Section 4 of said bill reads:

"Before any public body awards a contract for public works, it shall notify the department to ascertain the prevailing hourly rate of wages in the locality in which the work is to be performed, for each craft or type of workman needed to execute the contract or project. The public body shall specify in the resolution or ordinance and in the call for bids for the contract, what the prevailing hourly rate of wages in the locality is for each craft or type of workmen needed to execute the contract, also the general prevailing rate for legal holiday and overtime work, and it shall be mandatory upon the contractor to whom the contract is awarded and upon any subcontractor under him, to pay not less than the specified rates to all workmen employed by them in the execution of the contract. The public body awarding the contract shall cause to be inserted in the contract a stipulation to the effect that not less than the prevailing hourly rate of wages as found by the department or determined by the court on appeal shall be paid to all workmen performing work under the contract. It shall also require in all the contractor's bonds that the

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contractor include such provisions as will guarantee the faithful performance of the prevailing hourly wage clause as provided by contract."

We note that the above section provides that the public body shall specify in the "call for bids" for a contract for public works what the prevailing hourly rate of wages in the locality is for each craft or type of workman needed to execute the contract, including the prevailing rate for legal holiday and overtime work.

Said Act does not define the term "call for bids", nor do we find any judicial interpretation of this term by the appellate courts of this state. In the absence of such definition or interpretation, we must be guided by the rule of statutory construction set out in Section 1.090, RSMo 1949, to the effect that words and phrases shall be taken in their plain and ordinary and usual sense and technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.

We are of the opinion that the term "call for bids" is more comprehensive in its meaning than the term publication as the latter term is used in Section 8.250 and that while the term "call for bids" would include the publication in a newspaper, it is not limited thereto.

Section 8.250 does not specify what the publication required by said section shall contain. It has been the long standing policy of this state, established by executive construction, to insert in the publication that the public authority intends to enter into a contract for designated public improvements; that sealed proposals will be received at a designated time and place and there opened and publicly read. It has not been the established practice to include in such publication the detailed plans and specifications covering the proposed project or general and special conditions governing the details of the proposed contract. To determine the details of the work and the conditions and requirements of the contract in order to submit an intelligent proposal an intending contractor must secure such detailed information from the public authority which is, of course, made available on request.

It is our thought that the term "call for bids" as used in House Bill No. 294 implies a communication to prospective bidders

Honorable Ralph McSweeney

in sufficient detail so as to apprise intending bidders of the details and conditions of the proposed contract. A proposal submitted on details and conditions other than those under which the public authority desires to contract would not constitute a legal bid.

Therefore, it is our opinion that a specification of the prevailing hourly rate of wages in the locality for each craft or type of workman needed to execute a contract, including the prevailing rate for legal holiday and overtime work, either in the publication of the proposed public improvement or in the detailed plans, specifications and conditions governing the terms of the proposed contract, would fully comply with the requirements of House Bill No. 294, enacted by the 69th General Assembly.

Further, in support of the conclusion above reached, we note that Section 8.250, RSMo 1949, above referred to, requires publication in designated newspapers only when the total cost of the improvement exceeds the sum of \$10,000. We do not find any requirement either in this section, or elsewhere, for the publication in newspapers for state public works, the total cost of which does not exceed the sum of \$10,000. If the term "call for bids", as used in House Bill 294, supra, should be construed to be synonymous with newspaper publication, it would have no application to contracts for state public works, the sum total of which did not exceed \$10,000. We do not find any such exemption in said bill and are, therefore, of the opinion that it was intended to apply to all construction work (exclusive of maintenance), no matter what the amount, and that in using said term the legislature did not intend to limit its meaning to newspaper publication.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that a specification of the prevailing hourly rate of wages in the locality for each craft or type of workman needed to execute a state public works contract, including the prevailing rate for legal holiday and overtime work, either in the publication of the proposed state improvement or in the detailed plans, specifications and conditions governing the details of the proposed contract,

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would fully comply with the requirements of House Bill No. 294 enacted by the 69th General Assembly, requiring such specification in the "call for bids."

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:hw

COUNTY PROBATION OFFICERS:
STATE BOARD OF PROBATION
AND PAROLE:
PAROLE AND PROBATION OF
JUVENILES:
JUVENILE COURTS:
PAROLES:

The State Board of Probation and Parole is neither under a legal duty nor authorized to accept the supervision of a juvenile placed on probation or parole by a juvenile court.



February 5, 1957

Honorable Lewis M. Means
Chairman
Board of Probation and Parole
Missouri State Penitentiary
Jefferson City, Missouri

Dear Mr. Means:

We are in receipt of your letter of January 22 and its enclosures in which letter you have raised the question as to whether or not the State Board of Probation and Parole is responsible in any manner for the acceptance of supervision of a juvenile placed on probation by a magistrate court.

It is noted that the particular parolees with which this question deals are juvenile delinquents as distinguished from parolees convicted of criminal offenses and it might be well to point out that an adjudication of delinquency does not amount to a conviction for a criminal offense. *State v. Rutledge*, 13 SW2d 1061, 321 Mo. 1090. Consequently, even though the magistrate judges have broad powers by virtue of Sections 549.193 and 549.197, Cum. Supp. 1955, in the parole of persons convicted before them for violation of criminal laws, of county ordinances, or of any other offense for which trial may be had before them, the determination of the question presented is dependent upon an interpretation of the statutes in Chapter 211, RSMo 1949; (said chapter dealing with delinquent children and juvenile courts), for it is provided therein (Sections 211.020 and 211.320) that the courts designated as juvenile courts shall have original jurisdiction with respect to juvenile cases, and further, when such cases originate in other courts, they shall be transferred to the court or courts designated as juvenile courts, (Sections 211.060 and 211.350).

After an examination of the sections in Chapter 211, RSMo 1949, it is concluded that the intention of the legislature is that juvenile delinquents placed on parole or probation are to be under the jurisdiction and supervision of the juvenile courts and local probation officers.

Honorable Lewis M. Means

Quoting from an opinion of this office addressed to Mr. W. E. Sears, under date of September 21, 1955:

"Chapters 211 and 219, RSMo 1949, provide a complete scheme for the handling and treatment of delinquent children. Chapter 211 is divided into three parts: That part dealing with delinquent children in counties of classes one and two (Secs. 211.010-211.300, RSMo 1949), that part dealing with delinquent children in counties of classes three and four (Secs. 211.310-211.510, RSMo 1949), and that part generally applicable to all counties (Secs. 211.520-211.540, RSMo 1949).

"Juvenile courts are established for all classes of counties to have jurisdiction over cases brought to have determined the alleged delinquency of a child (Sec. 211.020 and 211.320, RSMo 1949). Provision is also made for the appointment of probation officers in counties of classes one and two (Sec. 211.200, RSMo 1949), and that in counties of class two they shall be known as juvenile officers (Sec. 211.220, RSMo 1949).

"In counties of classes three and four the county court is authorized to appoint a county superintendent of public welfare who shall have all the powers and duties conferred on probation or parole officers (Sec. 205.850, RSMo 1949). If, however, the county court fails to appoint a county superintendent of public welfare, the circuit judge shall designate or appoint a county officer or some other person to serve as probation officer under the direction of the court (Sec. 211.440). However, if there is neither a county superintendent of public welfare nor a probation officer, the sheriff must investigate all cases arising under Sections 211.310-211.510, RSMo 1949, and furnish the court such information and assistance as the judge may require. If a county of class three or four has either a county superintendent of public

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welfare or a probation officer, the sheriff shall serve as assistant probation officer (Sec. 211.455, RSMo, Cum. Supp. 1953).

"In all classes of counties it is the duty of the probation officer to make such investigation of the child as may be required by the court, to be present in court at the hearings, and to furnish to the court such information and assistance as the judge may require, 'and to take charge of any child before and after trial (hearing), as may be directed by the court.'" (Secs. 211.200 and 211.460, RSMo 1949.)"

As a further manifestation of the intention of the legislature with respect to the question at hand, it is noted that as to the appointment of juvenile officers in counties of the second class, a competitive examination for such position shall be given by the State Board of Probation and Parole, but that the appointment is made by the juvenile court or the juvenile division of the circuit court and the appointment of the deputies by the juvenile officer is subject to the approval of the circuit court.

It seems unnecessary to discuss each and every one of the sections of Chapter 211, yet it appears noteworthy that the legislature did not, in providing several alternatives for the juvenile court in third and fourth class counties in its handling of a juvenile case, authorize, expressly, the juvenile court to place the juvenile under the supervision of the State Board of Probation and Parole. Section 211.390, RSMo Cum. Supp. 1955. Said section reads in part as follows:

"1. When any child coming under the provisions of Sections 211.310 to 211.510 shall be adjudged to be neglected or delinquent or in need of the care of discipline and protection, the court may make an order committing the child, under such conditions as it may prescribe, to the care of some reputable person of good moral character, or to the care of some association willing to receive it, embracing in its objects the purpose of caring for neglected children, or to any institution incorporated under the laws of this state that may care

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for children, or to any institution or agency which is established by the state or county for the care of children; or the court may place the child in the care and control of a probation officer, and may allow such child to remain in its home subject to the visitation and control of the probation officer, to be returned to the court for further proceedings whenever such action may appear to the court to be necessary; or the court may authorize the child to be placed in a suitable family home, subject to the friendly supervision of a probation officer and the further order of the court; or it may authorize the child to be cared for in some suitable family home in such manner as may be ordered by the court or the court may arrange for proper care through voluntary contributions or otherwise until suitable provision may be made for the child in a home without payment."

From that which has been said and in examining Chapter 211, RSMo 1949, in its entirety, it appears rather clearly that the supervision of juvenile delinquents having been adjudged so by the juvenile courts and placed on parole or probation by said courts is the obligation and duty of the local probation officers, as provided in Chapter 211, supra.

CONCLUSION

It is therefore the opinion of this office that the State Board of Probation and Parole is neither under a legal duty nor authorized to accept the supervision of a juvenile placed on probation or parole by a juvenile court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Henry.

Very truly yours,

John M. Dalton
Attorney General

INTERSTATE COMPACTS:
EXTRADITIONS:
PROBATIONERS AND PAROLEES:
"STATES" AND "TERRITORIES:"



The grant of authority under Sec. 549.310 RSMo 1949, to enter into compacts and agreements with other states for the supervision of parolees and probationers does not include authority by the Governor to enter into such compacts and agreements with Hawaii and Puerto Rico.

August 29, 1957

Honorable Lewis M. Means
Chairman, Board of Probation
and Parole
State of Missouri
Jefferson City, Missouri

Dear General Means:

This will acknowledge receipt of your opinion request of July 18, 1957, which opinion request reads as follows:

"We have recently received a letter from Mr. B. E. Carihfield, for the Secretariat of the Parole and Probation Compact Administrators' Association of the Council of State Governments, informing us that Puerto Rico has ratified the Interstate Compact for the supervision of Parolees and Probationers, under authority of Public Law 970. This law defines the word 'states' to include Puerto Rico for purposes of Congressional Consent to interstate compacts for the control of crime.

"A blank execution page, which we are enclosing, was sent with his letter.

"Mr. Carihfield has asked that we ascertain whether or not you have defined the word 'states' to include Puerto Rico for purposes of the Compact. Would you, therefore, give us an official opinion in regard to this matter, and if the opinion is affirmative, have the enclosed execution page signed by the Governor and the Secretary of State.

"The Secretariat has asked us to return the execution page to them if we cannot participate with Puerto Rico."

A companion opinion request received a few days after the one

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set out above, and involving the same question of law with reference to Hawaii, which has also ratified the compact, will be ruled on in this opinion.

The various statutes involved will be set forth herein in chronological order.

In 1934 the Congress passed Section 111, Title 4 of the United States Code for the purpose of granting consent (Art. 1, Sec. 10, Clause 3 of the Constitution of the United States prohibits the states from entering into agreements and compacts with each other without the consent of Congress) and permission to states to enter into compacts and agreements with other states toward the prevention of crime and enforcement of criminal laws and policies. Said section, at that time, read as follows:

"(a) The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts."

Then, in 1945, the General Assembly of Missouri, pursuant to the provisions of the above quoted act of Congress, passed Section 549.310, RSMo 1949, which reads as follows:

"The governor is hereby authorized and directed to enter into a compact on behalf of the state of Missouri with any and all other states of the United States legally joining therein and pursuant to the provisions of an act of Congress of the United States of America granting the consent of congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes, which compact shall have as its objective the permitting of persons placed on probation or released on parole to reside in any other state signatory to the compact assuming the duties of visitation and supervision over such probationers and parolees; permitting the extradition and transportation without interference of prisoners, being re-taken, through any and all states signatory to said compact under such terms, conditions, rules and regulations, and for such duration as in the opinion of the governor of this

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state shall be necessary and proper."

Between the effective date of Section 549.310, supra, and the present time, compacts have been entered into between this state and most of the other forty-seven states of the United States.

Next, in August, 1956, the Congress amended Section 111, supra, by adding paragraph (b) thereto and the section now reads:

"(a) The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.

"(b) For the purpose of this section, the term 'States' means the several states and Alaska, Hawaii, the Commonwealth of Puerto Rico, and Virgin Islands, and the District of Columbia. May 24, 1949, c. 139 §129(B) 63 Stat. 107, amended August 3, 1956, c. 941, 70 Stat. 1020."

It was the amendment to Section 111, supra, and the ratification of the compact by Hawaii and Puerto Rico which gave rise to the question in the opinion request, to-wit: did the General Assembly of Missouri, when it passed Section 549.310, supra, authorizing and directing the Governor to enter into a compact between this state and any and all other states of the United States--pursuant to the provisions of an act of Congress (Title 4, Sec. 111) intend that the words "any and all other states of the United States" include territories, such as Hawaii and Puerto Rico, of the United States.

It should be noted that Section 549.310, supra, was passed before Section 111, supra, was amended so as to include territories within the meaning of the term "states."

As hereinbefore indicated, we believe that the question at hand is to be resolved from a determination of what the General Assembly of this state intended when it authorized and directed the Governor to enter into compacts between this state and "any and all other states of the United States." That, by amendment of Section 111, supra, the term "states" now includes territories of the United States, does not, ipso facto, extend or broaden the original meaning ascribed by the General Assembly of this state to the words "any and all other states

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of the United States," for there is no provision in Section 549.310, supra, that the said section is to be interpreted or amended in accordance with subsequent action by the Congress with respect to Section 111, supra. And that the Congress may have intended, although it is somewhat doubtful, in view of the fact that the amendment was for the purpose of defining, expressly, the meaning of the term "states," that the term "states" as used in Section 111, supra, before it was amended, include the territories of the United States within its meaning, is not determinative here, unless the General Assembly of this state intended "any and all other states of the United States" to be consistent in meaning with that ascribed by the Congress to the term "states." These points will be discussed briefly later on in this opinion.

No cases have been found where the words "with any and all other states of the United States," have been defined by the courts. There are many cases, however, where the term "states" has been defined. (Although the term "states" is not synonymous with the words "with any and all other states of the United States," it is believed, for the reason appearing hereinafter, that the latter words are more restrictive in meaning as to whether or not they include territories than is the term "states," and that, consequently, if the term "states" does not include territories then neither would the words in question.) In some cases the meaning can be determined from the particular statute or statutes wherein the term "states" appears, and in many of such cases the said term has been defined as including territories of the United States within its meaning. In other cases where it is not clear from the context as to the meaning of said term, the courts have relied on the common and ordinary understanding of what it ("states") means.

If the common and ordinary meaning of the term "states" is used as a basis for determining what the intention of the General Assembly was, then the only conclusion which can be reached is that the General Assembly did not intend that territories be included within the meaning of the words used in the statute (Section 549.310, supra).

In regard to this matter see the case of *Ex Parte Morgan*, 20 Fed. 298, in which case the court defined the term "states" as follows: l.c. 304:

"It means one of the commonwealths or political bodies of the American Union, and which, under the constitution, stand in certain specified relations to the national government, and are invested as commonwealths with full power, in their several spheres, over all matters not expressly inhibited. * * * *"

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The court in the same case, (Ex Parte Morgan, supra,) also defined territory in the following language, at l.c. 305:

"* * * A territory, under the constitution and laws of the United States, is an inchoate state, --a portion of the country not included within the limits of any state, and not yet admitted as a state into the Union but organized under the laws of congress, with a separate legislature, under a territorial governor and other officers appointed by the president and senate of the United States."

In comparing the definitions of the two terms, states and territories, it is immediately apparent that the definition of states does not include territories. Note that, whereas "state" was defined as one of the commonwealths or political bodies of the American Union, "territory" was defined as a portion of the country not yet admitted into the Union. And where it was stated that the state has full power over all matters not expressly inhibited, the same court defined the territory as being organized under the laws of Congress, under a territorial governor, and other officers appointed by the President, and the Senate of the United States.

We do not mean to determine the intention of the General Assembly from the commonly understood meaning of the words in question, alone, and without regard to the context wherein they were used.

After examining the context (Section 549.310, supra) wherein the words were used, and the related statute, Section 111, supra, we are unable to hold that the General Assembly of this state intended the words, "with any and all other states of the United States" to include territories of the United States. There are several reasons for such.

First, it is noted that the General Assembly of this state used the words "with any and all other states of the United States" and did not follow the wording "two or more states," as used in Section 111, supra. As hereinbefore indicated, it is believed that the words used by the General Assembly of this state are more restrictive in meaning. Whereas the words "two or more states" might in some instances include territories within their meaning, when the General Assembly of this state added the words "of the United States," it appears that the meaning was restricted. Although Puerto Rico or Hawaii may be a state in the sense that the term "state" is used in a particular statute, they are not united with the other states of the United States. In other words, the General Assembly of this state seemed to qualify the meaning to be ascribed to the words used by the addition of the words "of the United States."

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Secondly, insofar as the General Assembly of this state may have intended that the words used in Section 549.310 be consistent in meaning with those in Section 111, supra, it is noted that the Congress amended Section 111 in 1956, so that the term "states" now includes, expressly, territories within its meaning. If the Congress intended in Section 111, supra, as originally enacted, that the term "states" include territories within its meaning, and the reason for such amendment was to clarify this intended meaning, then this fact in itself, indicates that the legislatures of the various states have not construed and understood the term "states" to mean what it (the Congress) had intended. If, on the other hand, the reason for such amendment was because the term "states" did not include territories within its meaning when Section 111, supra, was originally enacted, then such would limit the meaning of the words in Section 549.310, supra, for the statute of Missouri could not be broader than the federal statute, inasmuch as consent is required of Congress by the states to enter into compacts and agreements between other states.

Although it is not absolutely clear as to the reason for the amendment of Section 111, supra, it appears that the later reason discussed above is the explanation of the amendment.

In a case involving a question as to what the Congress intended when it used the word "state" the court, in *United States v. Helpley*, 125 Fed. 616, stated, 1.c. 619:

"While the word 'state' has sometimes been construed to include the territories and the District of Columbia * * * still Congress surely may be assumed to have known that the word 'state' had often been held not to include the territories or the District of Columbia and if we give that body, which always numbers many able members of the legal profession among its members, credit for such knowledge, we cannot say with certainty that it intended the word 'state' to mean territory or District of Columbia."

In view of the foregoing it is concluded that the term "states" or the words, "with any and all other states of the United States" do not, unless it appears otherwise from the context, include territories within their meaning. It is further concluded, for the reasons pointed out, that there is nothing in the context which clearly indicates that the General Assembly of this state intended that territories be included within the meaning of the words used

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therein.

CONCLUSION

It is, therefore, the opinion of this office that the grant of authority under Section 549.310, RSMo 1949, to enter into compacts and agreements with other states for the supervision of parolees and probationers does not include authority by the Governor to enter into such compacts and agreements with Hawaii and Puerto Rico.

The foregoing opinion, which I hereby approve, was prepared by my assistant Mr. Harold L. Henry.

Yours very truly,

John M. Dalton
Attorney General

HLH:mw

STATE BOARD OF PROBATION
AND PAROLE:
PAROLEES:
THREE-FOURTHS LAW:

Under the provisions of Senate Bill No. 132, 69th General Assembly, time served on a parole counts toward time required to be served in the penitentiary and that, consequently, the three-fourths law (House Bill No. 318, 69th General Assembly) is applicable to inmates paroled by the State Board of Probation and Parole.



September 26, 1957

Honorable Lewis M. Means
Chairman
Board of Probation and Parole
Jefferson City, Missouri

Dear General Means:

This will acknowledge receipt of your opinion request of August 28, 1957, in which you asked the following:

"The new probation and parole law, Senate Bill No. 132, states on page 10, Section 8, paragraph 3, lines 40 to 41, that 'time served on parole shall be counted as time served under the sentence'; and in the same bill on page 10, Section 20, paragraph 1, lines 1-2, it is stated that 'the period served on parole shall be determined service of the term of imprisonment.'

"The Board of Probation and Parole would like very much to have your opinion as to whether the three-fourths rule for inmates in correctional institutions, as set out in House Bill No. 318, is applicable to inmates paroled under the new probation and parole law as set out in Senate Bill No. 132.

"Your opinion will determine whether inmates will be kept on parole beyond the expiration of three-fourths of their terms."

Certain provisions in the various sections of Senate Bill No. 132, 69th General Assembly (hereinafter referred to as

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"Senate Bill No. 132"), as pointed out in the opinion request, if read in connection with House Bill No. 318, 69th General Assembly, (hereinafter referred to as "Section 216.355 (1)"), give rise to the question as to whether or not time served while on parole is to be counted as time served under the sentence so that a parolee shall be discharged after three-fourths of the period for which he was sentenced has expired, in accordance with the provisions relating to a discharge under the three-fourths law (Section 216.355 (1)).

In order that the question may appear clearly, certain statutes, or parts thereof, shall be set forth.

Section 216.355 (1) reads as follows:

"1. Any person who is now or may hereafter be confined in any institution within the division and who shall serve three-fourths of the time for which he was sentenced in an orderly and peaceable manner, without having any infraction of the rules or laws of the institution recorded against him, shall be discharged in the same manner as if he had served the full time for which sentenced. In such case no pardon from the governor shall be required."

Senate Bill No. 132 pertains to probations, pardons and paroles. In said bill there appear the following provisions:

Section 18 (3):

" * * * In all other cases, time served on parole shall be counted as time served under the sentence."

Section 20 (1):

"1. The period served on parole shall be deemed service of the term of imprisonment and, subject to the provisions of section 21 of this act relating to a prisoner who is or has been a fugitive from justice, the total time served may not exceed the maximum term or sentence."

Honorable Lewis M. Means

Section 20 (2):

"2. When a prisoner on parole, before the expiration of the term for which he was sentenced, has performed the obligations of his parole * * *, the board * * * may make a final order of discharge and issue a certificate of discharge to the prisoner. * * *"

A strong and rather convincing, but not sound, argument can be made that the provisions of the three-fourths law and those of Senate Bill No. 132 in question are in nowise related. We do not take up the space here, however, to go into the same.

Time served on parole shall be counted as time served under the sentence. There can be no question about this; the law under scrutiny (Senate Bill No. 132) plainly states so. We believe that the term "sentence" as used in the law under examination means that fixed or determined by law, and not that imposed by court. To hold otherwise would give rise, in practical application, to absurd results in view of the provisions of Senate Bill No. 132. To illustrate, assume that a person was sentenced by the court to serve four years in the penitentiary. Assume further that he served without violating any of the rules or laws of the institution and, therefore, under the provisions of the three-fourths law for a period of two years and nine months, at which time he was paroled. Going one step further, assume that six months after the parole was issued, it was revoked and the party was recommitted to the penitentiary. If it were held that the sentence had not expired such would amount to a failure to count the time while on parole for, under the three-fourths law, the sentence expired at the end of three years, and adding the time served on parole, as the law in question requires, to the two years and nine months served prior to the issuance of the parole, it is obvious the sentence expired three months after the parole was issued.

If there is any doubt that a party paroled while serving under the three-fourths law loses the benefits of the three-fourths law, i.e., that by accepting a parole the provisions of the three-fourths law become inapplicable to his sentence, see the case of *Ex parte Carney*, 122 S.W. 2d 888, where it was held that such did not cause the three-fourths law to be inapplicable and in which case the Court stated "* * * the provisions of Sec. 8442 (three-fourths law), supra, become a part of every judgment of conviction with as much effect as if actually written therein, * * *." In other words, under the three-fourths law (Section 216.355 (1)), a person who serves

Honorable Lewis M. Means

three-fourths of sentence without any infractions of the rules or laws of the institution has served his sentence.

We are not unaware that the three-fourths law states that "any person who is now or may hereafter be confined" and serves three-fourths of his sentence in an orderly and peaceable manner, etc., shall be discharged as if he had served the full sentence. A party on parole, of course, is not confined, in fact. Whether or not he is, in law, we do not decide for we believe that the General Assembly may, in other laws, extend, expressly or by necessary implication as we hold it has done in this instance, the coverage of the three-fourths law.

It necessarily follows from the foregoing that, although the time served on parole counts as time served on the sentence, a person who has violated the rules and laws of the institution, or, in other words, a person who is not entitled to the benefits of the three-fourths law, and who is paroled, has no right to demand a discharge as a parolee or otherwise at the expiration of three-fourths of his sentence. (He might be discharged but not because he has a right, in law, to a discharge.)

It is concluded, then, that the terms "sentence" and "term of imprisonment" as used in Senate Bill No. 132, refer to that fixed by law and not that imposed by the sentencing court.

CONCLUSION

It is, therefore, the opinion of this office that under the provisions of Senate Bill No. 132, 69th General Assembly, time served on a parole counts toward time required to be served in the penitentiary and that, consequently, the three-fourths law (House Bill No. 318, 69th General Assembly) is applicable to inmates paroled by the State Board of Probation and Parole.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Henry.

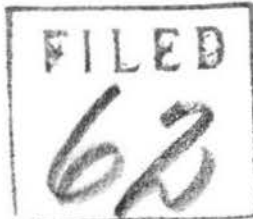
Yours very truly,

John M. Dalton
Attorney General

HLH:hw

COURT REPORTERS:
REPORTERS:

The County Court of Marion County cannot legally pay the circuit court reporters travel expense incurred in traveling from his place of residence in the county to the place of holding circuit court.



January 11, 1957.

Honorable Harry J. Mitchell
Prosecuting Attorney
Marion County
Palmyra, Missouri

Dear Mr. Mitchell:

This opinion is in reply to your inquiry reading as follows:

"I will appreciate your opinion in regard to the following matter.

"Section 485.090 Mo. R.S. 1949 provides for payment by the County of all sums of money actually expended by the official court reporter in necessary hotel and traveling expenses, while engaged in attending any regular, special, or adjourned term of court at any place in the judicial circuit in which he is appointed, other than the county of his residence, or while engaged in going to and from any such place for the purpose of attending terms of Court.

"It will be noted that the statute provides, 'other than the County of his residence.' The County of Marion has a peculiar situation in that under the statutes the Hannibal Court of Common Pleas has exclusive jurisdiction in Mason and Miller Townships, and the Circuit Court of Marion County has exclusive jurisdiction in all other townships of the County. Our Court Reporter is a resident of Hannibal, Missouri, a city within Mason and Miller Townships, Marion County, Missouri. Under the Statutes, the two Courts in this County are as separate and distinct as if they were for different counties. It seems to us that the Court Reporter should be paid for the expenses enumerated for attendance

Honorable Harry J. Mitchell

at the Circuit Court of Marion County, Missouri, at Palmyra.

"Will you please inform us as to whether or not the County Court can legally pay the Court Reporter's expenses incurred in attendance at the Marion County Circuit Court?"

Section 485.090 RSMo Cum. Supp. 1955, to which you refer, provides as follows:

"Every official court reporter of a circuit court of a judicial circuit comprised of two or more counties, in addition to his salary, shall be reimbursed for all sums of money actually expended by him in necessary hotel and traveling expenses while engaged in attending any regular, special or adjourned term of court at any place in the judicial circuit in which he is appointed, other than the county of his residence, or while engaged in going to and from any such place for the purpose of attending terms of court. Three-fourths of the actual expenses of the official court reporter, as herein provided, shall be paid out of the county treasury and one-fourth out of the state treasury. Where a judicial circuit is composed of more than one county, the county part of the expenses shall be divided among the counties in the manner provided in section 485.065; provided however that the actual expenses of the official court reporter upon transfer from the judicial circuit to which assigned shall be paid out of the state treasury."

It is to be noted that said section authorizes reimbursement for necessary hotel and traveling expenses while attending any regular, special or adjourned term of court at any place in the judicial circuit other than the county of his (court reporter) residence.

Under date of May 15, 1947, this office issued an official opinion to Honorable Louis H. Schult, Judge of the 38th Judicial Circuit, holding that the court reporter is not entitled to reimbursement for travel expenses incurred while traveling from his place of residence in the county to the place of holding court.

For the purpose of the question at hand, Section 13347 RSMo 1939, referred to in said opinion, is substantially similar to Section 485.090 noted supra. A copy of said opinion is enclosed herewith.

Honorable Harry J. Mitchell

Section 485.090 does not purport to allow reimbursement for expenses incurred in traveling from place to place within the county of the circuit court reporter's residence, and it is a fundamental rule of construction that the right of a public official to compensation must be founded on statute, and such statutes must be strictly construed against the officer. *Smith v. Pettis County*, 136 SW2d 282, 345 Mo. 839. We have examined the statutes relating to official court reporters and are unable to find any provision which would allow the circuit court reporter of Marion County travel expense for travel from his place of residence in said county to the place of holding circuit court.

CONCLUSION

Therefore, it is the opinion of this office that the County Court of Marion County cannot legally pay the circuit court reporter's travel expense incurred in traveling from his place of residence in the county to the place of holding circuit court.

The foregoing opinion, which I hereby approve, was prepared by my assistant Donal D. Guffey.

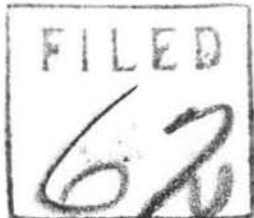
Very truly yours,

John M. Dalton
Attorney General

DDG/ld

enc. (1)

TAXATION:
MAXIMUM ANNUAL TAX
RATE FOR MUNICIPAL AND
SPECIAL PURPOSES BY
ALDERMEN:
FOURTH CLASS CITIES:



Maximum annual tax rate for general municipal purposes by aldermen of fourth class city without vote of qualified electors authorizing greater rate, is seventy-five cents on one hundred dollars assessed valuation, as provided by Sec. 94.250 RSMo 1949, plus annual tax rate of not exceeding twenty cents on one hundred dollars assessed valuation for any special purpose provided by said Sec. 2, Section 94.260 RSMo 1949. Maximum annual rate for general and special purposes combined to be levied by aldermen is ninety-five cents on one hundred dollars assessed valuation.

March 20, 1957

Honorable John E. Mills
Representative, Ralls County
House of Representatives
Capitol Building
Jefferson City, Missouri

Dear Mr. Mills:

This department is in receipt of your recent request for our legal opinion reading as follows:

"Please furnish me with an opinion stating the legal limit of a tax levy which may be made by a city council of a fourth class city without the vote of the people."

Section 11(a), Art. X, Constitution of Missouri, 1945, authorizes counties and other political subdivisions of the state to levy taxes on all property subject to their taxing power, and reads as follows:

"Taxes may be levied by counties and other political subdivisions on all property subject to their taxing power, but the assessed valuation therefor in such other political subdivisions shall not exceed the assessed valuation of the same property for state and county purposes."

Section 11(b), Art. X, Constitution of Missouri, 1945, refers to the preceding section, and provides a limitation on local tax rates. Said section reads in part as follows:

Honorable John E. Mills

" * * *

"For municipalities - one dollar on the hundred dollars assessed valuation;".

Section 11(c), Art. X, Constitution of Missouri, 1945, provides how the tax rate for municipalities may be increased above the maximum given in the preceding section, and reads as follows:

"Increase of tax rate by popular vote - further limitation by law - exceptions to limitation. - In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

Section 94.200 RSMo 1949, requires the board of aldermen of a fourth class city to provide for the levy and collection of taxes, and reads as follows:

"The board of aldermen shall, from time to time, provide by ordinance for the levy and collection of all taxes, licenses, wharfage and other duties not herein enumerated, and for neglect or refusal to pay the same, shall fix such penalties as are now or may hereafter be authorized by law or ordinance."

Section 94.210 RSMo 1949, provides that the board of aldermen of a fourth class city shall fix the annual rate of tax levy, and reads as follows:

"The board of aldermen shall, within a reasonable time after the assessor's books of each year are returned, ascertain the amount of money to be raised thereon for general and other purposes, and fix the annual rate of levy therefor by ordinance."

Honorable John E. Mills

Among other matters, Section 94.250 RSMo 1949, specifies the maximum annual rate of taxation that may be levied by the board of aldermen of a fourth class city. Said section reads in part as follows:

"All cities of the fourth class in this state may by city ordinance levy and impose annually for municipal purposes upon all subjects and objects of taxation within such cities a tax which shall not exceed the maximum rate of seventy-five cents on the one hundred dollars assessed valuation: * * *."

Section 94.260, RSMo 1949, reads as follows:

"Levy for special purposes - maximum amount of levy. - - In addition to the levy aforesaid for general municipal purposes, all cities of the fourth class are hereby authorized to levy annually not to exceed the following rates of taxation on all property subject to its taxing powers for the following special purposes:

"(1) For library purposes in the manner and at the rate authorized under the provisions of sections 182.140 to 182.300, RSMo 1949;

"(2) For hospitals, public health, and museum purposes, twenty cents on the one hundred dollars assessed valuation; and

"(3) For recreation grounds in the manner and at the rate authorized under the provisions of sections 90.500 to 90.570, RSMo 1949. L. 1945, p. 1280 (Sec. 709a).

Section 11(b), Art. X, supra, sets out the maximum tax rate of municipalities for general municipal purposes at one dollar on the one hundred dollars assessed valuation, while Section 11(c), Art. X, supra, states that the tax rates herein fixed may be further limited by law, and also the tax rates herein fixed may be further increased for the special purposes mentioned, when authorized and within the limits fixed by law.

It is believed that a fourth class city could not levy a tax for general municipal purposes, and for the special purposes under authority of the two constitutional provisions, but that it could levy those taxes and at the rates set out by any statutes enacted to implement said constitutional provisions. This is true because the power to tax is one

Honorable John E. Mills

exclusively belonging to the General Assembly. However, such power may be partially delegated to a municipality when any statutes granting a portion of that power to municipalities have been enacted by the lawmakers.

In support of our contention we call attention to the case of *Emerson v. Mound City*, 335 Mo. 702, in which this principle of law was upheld, and at l.c. 717-719 the court said:

"This leads us to observe that cities and other like municipal corporations do not derive their power and authority to levy taxes for municipal purposes directly from the Constitution. The power to levy and collect taxes is a legislative power (61 C.J. 552 and 554) vested by the Constitution in the General Assembly, popularly called the Legislature. The State Constitution, other than vesting all legislative power in the Legislature, only limits the taxing power which the Legislature may vest in municipal corporations as branches of the sovereign governing power. Cities and like municipal corporations have no inherent power to levy and collect taxes, but derive their powers in that respect from the law-making power. In 6 McQuillin Municipal Corporations (2 Ed.), section 2523, page 275, the law is stated thus: 'The taxing power belongs alone to sovereignty. No such power inheres in municipal corporations. This principle is universally recognized. Therefore as municipal corporations have no inherent power of taxation, consequently they possess only such power in respect thereto which has been granted to them by the Constitution or the statutes.

* * *

"In *State ex rel. Sedalia v. Weinrich*, supra, the court said: 'It was held in *State ex rel. v. Van Every*, 75 Mo. l.c. 537, that the limitations upon the taxing power of cities found in Section 11, Article X, of the Constitution are self-enforcing, but that the sections conferred upon a city no power to tax, that such power is derived "from acts of the General Assembly and not directly from the constitutional provision we are considering." . . . But the amount of the levy for current expenses cannot exceed the levy which is authorized by the Legislature,

Honorable John E. Mills

if the doctrine of the Van Every case is sound. That doctrine was unanimously reannounced in *Brooks v. Schultz*, 178 Mo. 1.e. 227.'

"The Legislature has power to still further reduce and to restrict the rates of taxation specified as maximum rates by Section 11, Article X, but not to increase same in any manner or for any purpose (State ex rel. *Johnson v. A. T. & S. F. Ry Co.*, 310 Mo. 587, 594, 275 S.W. 932), and it may direct and compel such city to use a designated part of its annual revenues for a designated purpose for which the city receives a special benefit (State ex rel. *Hawes v. Mason*, 153 Mo. 23, 54 S.W. 524; State ex rel. *Reynolds v. Jost*, 265 Mo. 51, 175 S.W. 591), but that does not give the city the power to levy a tax in excess of the constitutional limitation. (*Strother v. Kansas City*, 283 Mo. 293, 223 S.W. 419; State ex rel. *Zoological Board v. St. Louis*, 318 Mo. 910, 1 S.W. (2d) 1020.)"

From the doctrine enunciated in this case it is obvious that the General Assembly was authorized by the Constitution to enact Section 94.250, supra, fixing the maximum tax rate which can be levied by the board of aldermen of a fourth class city by ordinance, i.e., without being first authorized by the qualified voters. The maximum tax rate stated therein is seventy-five cents on the one hundred dollars assessed valuation for general municipal purposes, and is well under the maximum provided by Sec. 11(b), Art. X, of the Constitution. Section 94.250, supra, further provides a method by which the annual tax rate for municipal purposes, as therein specified, can be increased above said maximum, when the proposition to increase the tax, together with the proposed new rate and proposition is submitted to the voters at an election, and also when two-thirds of those voting at the election vote in favor of such proposition.

Subsection 2, Section 94.260, supra, authorizes fourth class cities to increase the annual tax levy in addition to that for general municipal purposes, not exceeding twenty cents on the one hundred dollars assessed valuation, for any of the special purposes mentioned therein. Section 94.260, supra, does not provide that the increased tax rate for the special purposes referred to in subsection 2 is required to be authorized by a majority of the qualified voters of the city. We are unable to find any other statute which makes this requirement, and it is believed that such increased tax rate, for any of the special purposes mentioned, may be levied by the board of aldermen.

Honorable John E. Mills

In view of the foregoing, it is our thought that the board of aldermen of a fourth class city, may by ordinance, and without being authorized by a majority of the qualified voters of the city, levy an annual tax for general municipal purposes, at a rate not to exceed seventy-five cents on the one hundred dollars assessed valuation, as provided by Section 94.250, supra, plus an annual tax for any of the special purposes, and at a rate of not to exceed twenty cents on the one hundred dollars assessed valuation, as provided by subsection 2, Section 94.260, supra. Therefore, the total annual tax rate for said general and special municipal purposes, which may be levied by the board of aldermen of a fourth class city, without being authorized by the qualified voters, is ninety-five cents on the one hundred dollars assessed valuation.

CONCLUSION

Therefore, it is the opinion of this department that the maximum annual tax rate for general municipal purposes, which can be levied by the board of aldermen of a fourth class city, without a vote of the qualified electors, authorizing a greater rate, is seventy-five cents on the one hundred dollars assessed valuation, as provided by Section 94.250, RSMo 1949, plus an annual tax rate of not to exceed twenty cents on the one hundred dollars assessed valuation for any of the special purposes authorized by subsection 2, Section 94.260, RSMo 1949, and that the annual tax levy by the board of aldermen for such general and special purposes combined shall not exceed ninety-five cents on the one hundred dollars assessed valuation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul M. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

PNC:ld,vlw

COUNTY HEALTH CENTERS:
TAXES:

A county health center tax authorized by the voters before October 31, 1957 can be levied and collected for the year 1957. Power to determine annually the rate of the county health center tax is vested solely in the board of health center trustees.



October 16, 1957

Honorable Roy C. Miller
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Mr. Miller:

This is in answer to your opinion request to this office dated September 5, 1957, and reading as follows:

"The County Court of Webster County is in the process of submitting to the voters of our county the proposition of authorizing a tax for the operation of a county health center as provided by Sections 205.010 and 205.020, R.S. of Mo. 1949, as amended. I would appreciate an opinion from your office in regard to the following:

"1. If the proposition passes and the tax is authorized prior to the time that the county collector commences collecting taxes for the year 1957, may this new tax be placed on the books and collected for the year 1957?

"2. Does Section 205.020 require the first levy set after the election to be the maximum tax approved? If it does not have to be the maximum, is the original levy for the first year set by the County Court under Section 205.020, or is it set by the Board of Health Center trustees as provided in Section 205.042, Paragraph 9, and Section 205.045?"

Enclosed is an opinion of this office to Honorable Donald P. Thomasson, Prosecuting Attorney of Bollinger County, which holds

Honorable Roy C. Miller

that a tax rate certified to the county clerk after taxes have already been extended by the county clerk in the tax book is to be carried in a supplemental tax book, and which opinion answers your first inquiry. However, for the sake of clarity, we will render a more direct opinion to your first inquiry.

Sections 137.290, 137.310, RSMo 1949, respectively, read:

"137.290.--The assessor's book shall be corrected and adjusted not later than September first of each year. The clerk of the county court in each county, upon receipt of the certificates of the rates levied by the county court, school districts and other political subdivisions authorized by law to make levies or required by law to certify levies to the county court or clerk of the county court, shall then extend the taxes in the assessor's book, in proper columns prepared for such extensions, according to the rates levied; and shall on or before the thirty-first day of October of each year deliver the tax book with the rates extended therein to the collector. The assessor's book, with the taxes so extended therein, shall be authenticated by the seal of the court as the tax book for the use of the collector; and when the assessor's book is in two or more volumes, such extension shall be made in all such volumes, and each volume shall be authenticated by the clerk with the seal of the court. And upon a failure to make out such extension of taxes in the assessor's book or books, as the case may be, and deliver same to the collector not later than October thirty-first, the county court shall deduct twenty per cent from the amount of fees which may be due the clerk for making such extension, and such assessor's book, with the taxes so extended therein, shall be called the 'tax book.'"

"137.310. As soon as may be after the tax book of each year has been corrected and adjusted, and the amount of county tax stated therein according to law but not later than October thirty-first the county courts shall

Honorable Roy C. Miller

cause the same to be delivered to the proper collector, who shall give receipts therefor to the clerks of the county courts respectively; and each collector shall be charged by such clerk with the whole amount of the tax books so delivered to him."

Under the above provisions all taxes levied by the county court, the rates of which are certified by the county court to the clerk of the county court before October 31 of each year, are to be placed by the clerk of the county court on the assessor's book and are to be collected by the collector.

Section 137.300, RSMo 1949, provides:

"When for any cause there has been a failure to levy the state, county, school or other taxes, or any portion thereof, or to extend and authenticate the same for the use of the collector, or to make out and deliver to the collector a proper tax book for the collection of the same, as required by law, in any county for any year or years, the clerk of the county court of such county for the time being, when so required for such state taxes by the state tax commission, and for such county, school or other taxes by the county court, shall make a supplemental tax book for such year or years. Such supplemental tax books shall be made upon the assessments for the year or years for which the taxes should have been levied, or where there has been a failure to assess the property, upon the assessment made as required by section 137.295, the taxes for each year to be in a separate book and to be levied for such state, county, school and other taxes or portions of the same, as had failed to be levied and collected at the proper time. In making said supplemental tax book, and in all subsequent proceedings thereon, the county court, clerk of the same and the collector shall be governed by the same law as is now or at the time then being or may be in force for the same duties, and shall receive the same compensation as is now or at the time then being or may be provided by law for similar duties; provided, that whenever such taxes or any portion of

Honorable Roy C. Miller

them shall have been paid upon defective or illegal tax books, the amounts so paid shall not be charged in such supplemental tax books, and when any such taxes have been paid in full upon any property, the same with the description of the said property and the name of the owner thereof, shall be omitted from such supplemental tax book."

Under this section when there has been a failure by the county court to levy a tax and to certify the rate thereof to the clerk of the county court before October 31, 1957, the tax can be levied by the county court and the rate thereof certified to the clerk of the county court after October 31, 1957 and the tax must then be placed in a supplemental tax book to be prepared by the clerk of the county court and then forwarded to the collector for collection.

In view of the above setout statutory provision, it is the opinion of this office that if the voters of Webster County authorize by an election a tax for the operation of a county health center before October 31 then the county court, after being notified by the board of health center trustees as to what the health center tax rate is to be for 1957, can levy the health center tax and certify the rate thereof to the clerk of the county court either before or after October 31, 1957, and the tax is collectible by the collector for the tax year 1957.

In answer to your second question, Sections 205.011, 205.020 and 205.042, of House Bill No. 52, enacted by the 69th General Assembly, provided, in part, as follows:

Section 205.011.

"In any county in which a county health center has been established, the rate of tax which has been authorized by the vote of the people of the county shall continue as the maximum rate, and the board of health center trustees shall determine annually the rate of the tax levy up to, but not exceeding, this maximum."

Section 205.020.

"2. If a two-thirds majority of the votes cast at such election on the proposition so

Honorable Roy C. Miller

submitted, shall vote in favor of such tax, the county court shall proceed to levy and collect such tax and deposit same in the county treasury to the credit of the health center fund and such fund shall be expended as hereinafter provided."

Section 205.042.

"9. The board of health center trustees shall determine annually the rate of the tax levy, except that the rate so determined shall not exceed the maximum rate authorized by the vote of the people of the county."

Under the above provisions, after the voters by an election have authorized a health center tax and established the maximum rate of tax that can be levied for the county health center, the power to determine the annual rate of the county health center tax is vested exclusively in the board of trustees of the county health center. The board of trustees of a county health center determines annually the rate of the health center tax; informs the county court of the tax rate said board of trustees have decided upon and the county court then has the duty to levy and collect said health center tax and to deposit the taxes collected with the county treasurer to the credit of the health center fund.

The county court has no power to determine the annual rate of the health center tax, nor do the statutes require that the rate of the health center tax for the first year after the tax is authorized by the voters be the maximum rate established by the voters.

CONCLUSION

It is the opinion of this office that if the voters of Webster County authorize a county health center tax before October 31, 1957, then said health center tax can be levied and collected for the year 1957.

It is also the opinion of this office that the power to determine annually the rate of the county health center tax is vested solely in the board of health center trustees and that

Honorable Roy C. Miller

the county court has no power to determine the annual rate of the health center tax, nor do the statutes require that the maximum rate be levied the first year after the tax is authorized by voters of the county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard W. Dahms.

Very truly yours,

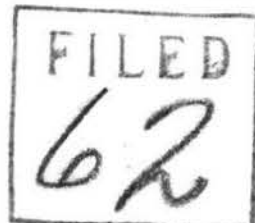
John M. Dalton
Attorney General

RWD:mw:hw

Enclosure

WORKMEN'S COMPENSATION:
REHABILITATION:
APPROPRIATIONS:
COMPENSATION:
BOARD OF REHABILITATION:

Funds appropriated in Section 4.640 of House Bill No. 204, 69th General Assembly may not be used to pay the sum of \$2,500 each, per annum, to the several members of the Board of Rehabilitation under provisions of Section 287.143.



October 21, 1957

Honorable Stephen J. Millett
Chairman
Board of Rehabilitation
Department of Labor and
Industrial Relations
Jefferson City, Missouri

Dear Mr. Millett:

This office is in receipt of a request for an opinion from you as follows:

"A legal question has arisen as to whether or not the individual members of the Board of Rehabilitation, which is a part of the Department of Labor and Industrial Relations, are employees of the Board of Rehabilitation so as to be eligible to receive the salaries provided by the 69th General Assembly in House Bill 182, approved by the Governor, and effective August 29, 1957 by virtue of the provisions in the appropriation of the bill entitled House Bill 204 Section 4.640 which appropriates \$15,000.00 or so much thereof as may be necessary for the use of the Board of Rehabilitation for the payment of salaries, wages, and per diem of employees thereof. House Bill No. 182 provides 'There shall be paid out of the Workmen's Compensation Fund, created under Section 287.710, for the duties performed by the several members of the Board of Rehabilitation under Section 287.141 and 287.142 the sum of \$2,500.00 each, per annum, payable monthly'.

"So we contend that the respective members of the Board of Rehabilitation are not only employees of the State but are also employees of the Board of Rehabilitation. We are re-

Honorable Stephen J. Millett

questing an official opinion of your office as to whether or not the respective or several members of the Board of Rehabilitation are employees of the Board of Rehabilitation as a legal entity of the Department of Labor and Industrial Relations."

In answer to your request it is first thought necessary to examine the present law in regard to the Board of Rehabilitation. The rehabilitation law into which we must inquire here, is believed to be now comprised of Section 287.141, Cum. Supp. 1955 and Sections 287.142 and 287.143, which have been enacted by the 69th General Assembly. The first section mentioned provides for the creation, members, duties and benefits of the Board of Rehabilitation. Section 287.142 of the original law was repealed and reenacted and Section 287.143 was added in House Bill No. 182 of the 69th General Assembly, Section 287.143, House Bill 182, is as follows:

"1. There shall be paid out of the workmen's compensation fund, created under section 287.710, for the duties performed by the several members of the Board of Rehabilitation under sections 287.141 and 287.142, the sum of two thousand five hundred dollars each, per annum, payable monthly.

"2. All clerical, travel and other expenses incurred in connection with the administration of section 287.141 shall be paid from the workmen's compensation fund."

It must be noted that the last above section was enacted by the Legislature for the first time in the 1957 session and became a law August 29, 1957.

A search of House Bill No. 204, which is the appropriation bill, enacted by the 69th General Assembly fails to reveal any appropriation, other than Section 4.640, mentioned in your request letter, applicable to the payment of salaries under Section 287.143.

From a search of all of the appropriation bills it must be concluded that the only section possibly applicable for payment of the salaries in question is Section 4.640 as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the Workmen's Compensation Fund, the sum of

Honorable Stephen J. Millett

Fifteen Thousand Dollars (\$15,000.00)
or so much thereof as may be necessary
for the use of the Board of Rehabilitation
for the payment of salaries, wages
and per diem of employees thereof, for
the original purchase of property; for
the repair and replacement of property;
and for operating expenses including
travel within and without the state,
and other necessary expenses for the period
beginning July 1, 1957 and ending June 30,
1958."

This section was enacted as shown in the appropriation bill
in accordance with the executive budget for the State of Missouri
for the fiscal year 1957-1958, page 256, which is reproduced as
follows:

"DEPARTMENT-LABOR AND INDUSTRIAL RELATIONS
DIVISION-BOARD OF REHABILITATION-ADMINISTRATION

PERSONNEL		
	1953-55	1955-57
Officers-Full Time.....	4	4
Employees-Full Time.....	1	2
Totals	5	6

FROM FUNDS AND EARNINGS

Appropriation	Expenditures	Estimated	Total		1957-58 Biennial	Governor
1955-57	1955-56	Expenditures	Expenditures		Requests	Recommends
Biennium	Fiscal Year	1956-57	1955-57		Requests	1957-58
		Fiscal Year	Biennium			Fiscal year
\$30,000.00	\$12,729.23	\$17,270.77	\$30,000.00	{ Personal Service.....		
				{ Additions.....	\$15,000.00 - - - - -	\$15,000.00
				{ Repairs and Replacements.		
				{ Operation.....		
<u>\$30,000.00</u>	<u>\$12,729.23</u>	<u>\$17,270.77</u>	<u>\$30,000.00</u>	Totals.....	<u>\$15,000.00 - - - - -</u>	<u>\$15,000.00</u>

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By the express terms of 287.147, supra, the salaries are to be paid to the members of the board for their duties performed as members of the board. The funds to be used in accordance with that section, were to be appropriated out of the Workmen's Compensation fund. In subsection 2, it was provided that clerical, travel and other expenses, were to be appropriated out of the Workmen's Compensation fund. It will be noted that by the express language used, the payment was to be made to members of the board as members. Since the express terms are that they are to be paid as members, they cannot be paid out of funds for the board's employees.

The Supreme Court in the case of Nodaway County v. Kidder, 129 SW 2d 857, in respect to the employer and employees relation in public office at l.c. 859-860, states as follows:

"Appellant contends he may act in two different capacities at the same time and that compensation received in one capacity will not be treated as compensation received in the other. Appellant overlooks the fact that the existence of the two capacities, employer and employee, in the same individual is incompatible and is peremptorily prohibited by law."

Since the executive budget, quoted supra, shows that \$30,000.00 was expended or estimated to be spent in the 1955-57 biennium, before any provision was made for salaries to be paid to the members of the Board of Rehabilitation, it certainly cannot be believed to have been the intent of the Legislature that the \$10,000.00 required, should be taken out of this present \$15,000.00 appropriation. This money had been used entirely in the 1955-57 biennium under the old section 287.142. That section, although repealed, was reenacted as subsection 2 of 287.143 of House Bill No. 182.

Further examination of the appropriation law shows that the appropriation for the 1955-1957 biennium was couched in identical language and had the same section number in 1955 as Section 4.640. Of course that law being for a biennium, differed in the amount being \$30,000.00 instead of \$15,000.00 and being for the biennial period rather than for one year.

In view of the factual situation as set out, we think that it is best to quote from Article IV, Section 23 of the Constitution of Missouri, 1945, in which we quote in part as follows:

"* * * * Every appropriation law shall distinctly specify the amount and purpose of

Honorable Stephen J. Millett

the appropriation without reference to any other law to fix the amount or purpose."

Also it is provided in Section 24 of that article that the Governor shall submit to the General Assembly a budget for the ensuing appropriation period containing * * * "a complete and itemized plan of proposed expenditures of the state and all its agencies, * * * " It is believed that after considering the above, it must be said that the Legislature did not appropriate out of the Workmen's Compensation Fund, the necessary \$10,000.00 to pay the several members of the Board of Rehabilitation the sum of \$2,500 each, per annum, as it had provided for by law in Section 287.143 of House Bill 182.

CONCLUSION

Therefore, it is the opinion of this office that funds appropriated in Section 4.640 of House Bill No. 204, 69th General Assembly, may not be used to pay the sum of \$2,500 each, per annum, to the several members of the Board of Rehabilitation under the provisions of Section 287.143, House Bill No. 182 of the 69th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Faris.

Yours very truly,

JOHN M. DALTON
Attorney General

JWF:db

COUNTY COURTS: The county court of Howell County may not
CITIES: contribute county funds to the city of
CITY HOSPITAL: West Plains for the purpose of erecting a
DONATIONS BY city hospital in the city of West Plains.
COUNTY COURT: Such activity may be done by a joint co-
operative basis in accordance with the
laws of the State of Missouri.



March 27, 1957

Honorable Richard D. Moore
Prosecuting Attorney
Howell County
West Plains, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"The City of West Plains is trying to finance the building of a memorial hospital in West Plains. They have raised most of the necessary funds.

"Mrs. Dean Davis of West Plains, who is one of the leaders of the hospital committee, recently came to me and requested that I write you and obtain your opinion on an idea she had for additional financing of the building. She was wondering if the County Court would be permitted to invest money through the purchase of one of the hospital rooms or as an actual shareholder in the hospital itself. I can find no authority for expenditure of funds in this manner by the County Court.

"The hospital committee is in need of completing their financial arrangements by some date in April, so if you could give me your opinion as to this question at your earliest possible convenience, it would be greatly appreciated."

Honorable Richard D. Moore

All references to statutes will be to Revised Statutes of Missouri, 1949, unless otherwise indicated.

Subsequent to receiving the above opinion request we asked you to clarify the meaning of the terms used by you above, "to invest money through the purchase of one of the hospital rooms or as an actual shareholder in the hospital itself."

You orally explained to us that by the first term you meant that the county court would contribute a sum of money approximately sufficient to build one of the hospital rooms, and that the size of such a contribution would, of necessity, be very general and approximate. You also explained that the meaning of the other term was also very general and simply meant that, although no shares of stock were issued in the hospital, contributors were entitled to a seat on the hospital board. You stated that in both instances the terms used were simply means by which the County of Howell could contribute to the city hospital of West Plains, and that actually any money which Howell County gave to the hospital would be a pure donation.

This we do not believe that the county court of Howell County can do.

On July 8, 1954, this department rendered an opinion, a copy of which is enclosed, to Dick B. Dale, Jr., Prosecuting Attorney of Ray County. This opinion, as you will note, held that the county court of Ray County had no authority to make donations to the city of Richmond for a city park.

On May 12, 1952, this department rendered an opinion, a copy of which is enclosed, to Roger Hibbard, Prosecuting Attorney of Marion County. In that opinion we held that the county court of Marion County had no authority to contribute county funds to aid in the construction of a sewer system for the city of Hannibal, Missouri. You will also note that the Dale opinion refers back to the Hibbard opinion.

The matter of importance to which we would direct at-

Honorable Richard D. Moore

tention in both opinions is expressly stated on page 2 of the Hibbard opinion in which we quote from the case of King v. Maries County, 297 Mo. 488, 1. c. 496, where the court stated:

"It has been held uniformly that county courts are not the general agents of the counties, or of the State. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute."

In the Dale and Hibbard opinions we were unable to find any statutory grant of power which would permit the county courts of these respective counties to make contributions of county funds for the purposes discussed, to wit, the construction of a city park and of a city sewer system. We, likewise, have searched the statutes for any authorization conferred by statute upon county courts to donate county funds for the purpose of erecting a city hospital in a municipal corporation within the county and we, likewise, are unable to find such authorization.

It is, therefore, our opinion that Howell County may not make a donation of county funds for the purpose of helping erect a city hospital in the city of West Plains in Howell County.

However, in the two opinions which we have discussed, a method has been indicated by which the counties involved might make contributions. This method is set forth in Chapter 70, which is entitled, "Powers Of Political Subdivisions To Cooperate Or Contract With Governmental Units." We particularly direct attention to Section 70.210 which is entitled, "Cooperation By Political Subdivisions Under Contract." That section defines "political subdivisions" to mean and to include counties and cities.

Section 70.220 reads:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate

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with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

Section 70.250 reads:

"Any such municipality or political subdivision may provide for the financing of its share or portion of the cost or expenses of such contract or cooperative action in a manner and by the same procedure for the financing by such municipality or political subdivision of the subject and purposes of said contract or cooperative action if acting alone and on its own behalf."

For reasons which must be obvious, we shall not here make any attempt to define the terms of any contract or

Honorable Richard D. Moore

cooperation which might be made between the city of West Plains and Howell County for the erection of this afore-said hospital. We do believe that such discussion of this matter as is found in the enclosed opinions, together with our own discussions of it, may point the way to you for a method by which the County of Howell may have a part in the highly meritorious project of erecting a hospital from which the inhabitants of Howell County outside of the city limits of West Plains will greatly benefit.

CONCLUSION

It is the opinion of this department that the County Court of Howell County may not contribute county funds to the city of West Plains for the purpose of erecting a city hospital in the city of West Plains.

However, we are of the further opinion that such activity may be done by a joint cooperative basis in accordance with the laws of the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

2 enclosures

SCHOOLS:
SCHOOL DISTRICTS:
ANNEXATION:
BOARD OF EDUCATION:

The annexation of A school district to B school district after an annexation election in A school district must be approved by a majority of the Board of B school district before said annexation can occur. The County Board of Education can divide existing school districts for purposes of reorganization under Section 165.685, Cum. Supp. 1955.



April 22, 1957

Honorable Richard D. Moore
Prosecuting Attorney
Howell County
West Plains, Missouri

Dear Mr. Moore:

This is in answer to your opinion request to this office dated April 4, 1957, and reading as follows:

"I was requested to obtain an opinion from your office on the following problem which involves the legal status of the former Big Springs School District #107 in Douglas County.

"On November 29, 1956, the Douglas County Reorganization Board certified the release of Big Springs #107 to the Howell County Board for a plan of reorganization with this county inasmuch as this school district adjoins Howell County.

"On March 11, 1957, the Howell County Board permitted the Big Springs District #107 to post notices to annex to the Dora Consolidated District #3 in Ozark County, with the understanding that if the annexation election failed, then the Big Springs district would later be placed in a Howell County Reorganization plan.

"March 12, 1957, the Big Springs Board posted notices for an annexation election on March 26 of 1957. On March 26, 1957, the voters of Big Springs School District voted 30 for and 29 against annexation with Dora Consolidated #3. On March 29, 1957, Dora Consolidated #3 was reorganized with other school districts in an Ozark County Reorganization Plan. The plat of the Reorganized School District R-3 of which Dora Consolidated #3 is now a part did not contain the former #107 Big Springs in Douglas County within its borders.

Honorable Richard D. Moore

"On March 30, 1957, Herman Melton, County Superintendent of Ozark County Schools stated that the certification of annexation of Big Springs and Dora Consolidated #3 had not been filed with the County Clerk of Ozark County at Gainesville.

"Now the question is, is District #107 Big Springs in Douglas County a part of the new Reorganized #3 in Ozark County or is it still a common school district?"

For the purpose of this opinion Big Springs School District No. 107 of Douglas County shall be referred to as Big Springs; the Dora Consolidated School District No. 3 of Ozark County shall be referred to as Dora and the Reorganized School District R-3 of Ozark County shall be referred to as R-3.

Section 165.300 RSMo 1949, provides in part, as follows:

"1. Whenever an entire school district, or a part of a district, whether in either case it be a common school district, or a city, town or consolidated school district, which adjoins any city, town, consolidated or village school district, including districts in cities of seventy-five thousand to five hundred thousand inhabitants, desires to be attached thereto for school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special meeting or special election for said purpose by giving notice as required by section 165.200; provided, however, that after the holding of any such special election, no other such special election shall be called within a period of two years thereafter.

"2. Should a majority of the votes cast favor such annexation, the secretary shall certify the fact, with a copy of the record, to the board of said district and to the board of said city, town or village school district; whereupon the board of such city, town or village district shall meet to consider the advisability of receiving such territory, and should a majority of all the members of said board favor such annexation, the boundary lines of such city or town school district shall

Honorable Richard D. Moore

from that date be changed so as to include said territory, and said board shall immediately notify the clerk of said district which has been annexed, in whole or in part, of its action."

As can be seen the portion of the section set out above requires that the results of the annexation election by Big Springs must be submitted to the Board of Education of Dora and that a majority of the Board of Dora must approve the annexation of Big Springs to the Dora District. If a majority of the Board of Dora does not approve the annexation then, of course, there can be no annexation. There is nothing in your opinion request to indicate that the results of the annexation election held by Big Springs was submitted to the Board of the Dora District and approved by a majority thereof. Therefore, based on the facts as stated in your opinion request, this office would conclude that there has been no annexation of the Big Springs District to the Dora District and that Big Springs is still a common school district and is not a part of R-3. However, even if we were to assume that a majority of the Board of Dora District did approve the annexation of Big Springs to Dora it does not necessarily follow that Big Springs became a part of R-3 merely because Dora became a part of R-3.

Section 165.685, RSMo Cum. Supp. 1955, provides as follows:

"In recommending proposed reorganization plans, the county board of education may divide existing unreorganized districts if such division is in the best interests of the children, and place any portion in any proposed enlarged district. If a portion of the territory of any district has been incorporated in a reorganized district, the remaining part may elect to become a part of an adjoining district. For the purpose of such election the qualified voters of such part of a district shall call a special meeting and vote on the proposition as provided in section 165.300. If the remaining part of any divided district fails to become a part of a reorganized district within sixty days and does not meet the requirements of section 165.177 the part shall be annexed by the county board to an adjoining district. The annexed territory shall become a part of the receiving district upon receipt by the secretary or clerk of such district of notice of such

Honorable Richard D. Moore

annexation from the county board."

This section provides that existing unreorganized districts can be divided by the County Board of Education for the purpose of reorganization plans; therefore, if the County Board of Ozark County decided not to include that portion of Dora which was formerly Big Springs District in R-3 then they could split the Dora District and include in R-3 only that portion thereof which they so desired to include.

CONCLUSION

It is the opinion of this office that if a majority of the Board of Education of Dora District did not approve the annexation to Dora of the Big Springs District then Big Springs is still a common school district and not a part of R-3.

It is also the opinion of this office that assuming the majority of the Board of Dora District did approve the annexation of Big Springs to Dora, Big Springs is not a part of R-3 as the County Board of Education of Ozark County can divide existing school districts for purposes of reorganization and in preparing the reorganization plan for R-3 that Board did not include therein that portion of Dora District which was formerly known as Big Springs District.

The foregoing opinion, which I hereby approve, was prepared by my assistant Richard W. Dahms.

Yours very truly,

RWD:mw

John M. Dalton
Attorney General

SALARIES OF PROSECUTING ATTORNEYS,
COUNTY CLERK, COUNTY SUPERINTENDENT
OF SCHOOLS, DEPUTY COUNTY CLERK,
DEPUTY CIRCUIT CLERK AND RECORDER
IN FOURTH CLASS COUNTIES WITH POPU-
LATION OF BETWEEN 15,000 AND 17,500.

Prosecuting attorneys in fourth
class counties do not receive any
salary increase by virtue of any
legislation enacted by the 69th
General Assembly; that on and after
Aug. 29, 1957, county clerks in
fourth class counties are entitled
to increased compensation in the

sum of \$500 per year; that on and after Aug. 29, 1957, the county super-
intendent of schools in fourth class counties is entitled to an increase
in compensation of \$400 per year; that deputy county clerks in fourth
class counties are entitled to \$500 per year additional compensation by
virtue of legislation enacted by the 69th General Assembly; that the chief
deputy circuit clerk in counties having a population of 15,000 and less
than 17,500, shall receive the sum of \$2,280 per year compensation; that
the first deputy shall receive the sum of \$2,100 per year; and the second
deputy shall receive the sum of \$1,920 per year compensation.

Honorable Garner L. Moody
Prosecuting Attorney
Wright County
Mansfield, Missouri

November 29, 1957



Dear Mr. Moody:

Your recent request for an official opinion reads:

"I have been asked by the County Court
for an opinion concerning certain
salaries after August 29, 1957. It
seems that the legislature has seen fit
to raise some salaries, but there is
some question as to whether the salaries
were to take effect during the present
tenure of office.

"I should like an opinion from your
office as to the salaries of the follow-
ing offices in fourth class counties with
a population between 15,000 and 16,000
after August 29, 1957: Prosecuting attor-
ney, County Clerk, and the County Super-
intendent of Schools.

"It seems that salaries for deputies in
the county clerk's office and the circuit
clerk's office have been raised by statute,
and I should like an opinion as to how
much raise was given the deputy clerks for
those two offices and when the raise is
effective."

We note first that the 69th General Assembly enacted legis-
lation increasing the salaries of all of the county officers and
deputies enumerated by you. The matter which we have to decide is

Honorable Garner L. Moody

when these officers and deputies will begin to receive this additional compensation. We note further that this matter hinges upon Section 13 of Article VII of the Constitution of Missouri, 1949, which reads:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

We also note that all salaries quoted by us will be for fourth class counties.

Since the 69th General Assembly adjourned on May 31, 1957, and since none of the salary increase bills here under consideration contains an emergency clause, their effective date is August 29, 1957, which is ninety days after the adjournment of the 69th General Assembly.

When the county officers will begin to draw the compensation provided by these bills is another question. We shall consider these officers and deputies in the order of their listing by you.

Prosecuting Attorney.

Senate Bill No. 198 provides that prosecuting attorneys in counties of the fourth class shall receive an additional \$600 per year as compensation for services performed in relation to aid to dependent children, which services are imposed upon them by Section 208.040, V.A.M.S., Cum. Supp. 1955. On August 15, 1957, this department rendered an opinion to William G. Johnson, Prosecuting Attorney of Morgan County, in which we held that prosecuting attorneys in third and fourth class counties are not entitled to receive the additional compensation provided by Senate Bill No. 198 during their present terms of office. A copy of this opinion is enclosed. As you will note, our reasons for this holding are that the duties for which this compensation was provided had already been imposed upon prosecuting attorneys in 1955, and that the compensation was not for additional duties, and that, therefore, for prosecuting attorneys to receive this compensation during their present terms of office would be violative of Section 13 of Article VII of the Constitution of Missouri, quoted above.

County Clerk.

By House Bill No. 165, enacted by the 69th General Assembly, the compensation of county clerks in fourth class counties is

Honorable Garner L. Moody

increased in the amount of \$800 per year. However, according to the provisions of this bill (Subsections 1 and 2 of Section 49.125), additional duties are laid upon the county clerk, and it is for these additional duties that the additional compensation is given. In this situation we believe that there can be no doubt but that Section 13 of Article VII of the Missouri Constitution does not apply, and that the county clerk may receive the additional compensation after the effective date of the bill which provides it, which date will be August 29, 1957.

In the case of *Mooney v. County of St. Louis*, 286 S.W. 2d 763, at l.c. 766, the Missouri Supreme Court stated:

"(4) There can be no doubt but that the legislature may award extra compensation to an incumbent for the performance of certain newly imposed duties without violating the constitutional inhibition under consideration. *State ex rel. McGrath v. Walker*, 97 Mo. 162, 10 S.W. 473; *State ex rel. Harvey v. Sheehan*, 269 Mo. 421, 190 S.W. 864; *Denneny v. Silvey*, 302 Mo. 665, 259 S.W. 422; *Little River Drainage Dist v. Lassater*, 325 Mo. 493, 29 S.W. 2d 716. * * *"

Such being the situation, we believe, as we stated above, that the county clerk will begin to receive this additional compensation after August 29, 1957.

County Superintendent of Schools.

House Bill No. 31 gives county superintendents in fourth class counties (lines 8, Section 5) an increase of \$400 per year. This increase is given as compensation for additional duties imposed by the bill in regard to aid to handicapped children. Because additional duties are imposed for which this compensation is provided, we believe, for the same reasons that are given above in regard to county clerks, that county superintendents will be entitled to this additional compensation on and after August 29, 1957.

Deputy County Clerk.

By House Bill No. 165, enacted by the 69th General Assembly (lines 43 through 45), the salary of the deputy county clerk in fourth class counties is increased \$500 per year. The effective date of this bill was August 29, 1957.

Honorable Garner L. Moody

Section 51.460, RSMo 1949, divides the counties of the fourth class into population groups and provides that the clerk of the county court in each such county shall be entitled to employ deputies and assistants and for such deputies and assistants shall be allowed the sums as in said section provided. This section begins:

"The clerk of the county court in counties of the fourth class shall be entitled to employ deputies and assistants and, for such deputies and assistants, shall receive the following sums: * * *."

It should be noted here that there is no provision for a fixed or definite term in said section for the deputies and assistants. Neither, however, is there any provision in this section which specifically gives the county clerk the power to terminate such an appointment of a deputy or an assistant.

In this connection we note the following (Vol. 67, C.J.S., p. 450, Sec. 149):

"Deputies, whether common law or statutory, are, where their terms are not fixed by statute, supposed to be appointed at the pleasure of the appointing power, and their deputation expires with the office with which it depends."

In the case of *Southern Railway Co. v. Hamilton County*, 138 S.W. 2d 770, at l.c. 772, the Court of Appeals of Tennessee for the Eastern Section held:

"Where a deputy's term is not fixed by statute, the duration of his term is at the pleasure of the appointing power.
46 C.J. 1062."

It clearly appears from the statute cited above that deputies and assistants appointed by the clerk of the county court in counties of the fourth class do not have a "term of office."

In this regard, we note the general rule as stated 37 L.R.A. (N.S.) 389, to wit:

Honorable Garner L. Moody

"The general rule, however, seems to be that this constitutional prohibition against changing the salary of a public officer during his term of office applies only to officers who have a fixed and definite term, and does not apply to appointive officers who hold only at the pleasure of the appointing power."

Corpus Juris Secundum, Vol. 67 at page 355, states as follows:

"However, where the statute provides a fixed salary for the officer and salary for deputies, all payable out of the public treasury, an increase in the salary of such deputies, or an extra allowance for clerk hire, or a provision for extra deputies, is not within the Constitutional prohibition, since the government has undertaken to pay the officer and the expenses of running the office."

In view of the above, it would seem to be clear that the deputy county clerk does not have a "term of office" within the meaning of the constitutional prohibition discussed more fully below and that, therefore, the deputy county clerk is entitled to the salary increase provided by House Bill No. 165 as of August 29, 1957.

Deputy Circuit Clerk.

By Senate Bill No. 161, enacted by the 69th General Assembly, the following provision is made (subsection 4, Section 483.382, lines 22 through 27):

"(4) In counties having a population of fifteen thousand and less than seventeen thousand five hundred, the chief deputy shall receive the sum of two thousand two hundred eighty dollars; the first deputy shall receive the sum of two thousand one hundred dollars; the second deputy shall receive the sum of one thousand nine hundred twenty dollars."

This bill provides in part (lines 13 through 17) that "the circuit clerk and recorder may, at any time, discharge any deputy or assistant and may regulate the time of his employment and the circuit court, for good cause, may at any time modify or rescind

Honorable Garner L. Moody

its order permitting an appointment to be made." In the case of State ex rel. v. Gordon, 238 Mo. 168, at l.c. 180, et seq., the Missouri Supreme Court stated:

"Recognizing the precision of definition judicially indulged in the exposition of the constitutional provision now up, as already indicated, we now come to a closer view of the case and to the application of the doctrines announced to the facts in judgment. The final question is: Considering the terms of the law of 1905 under which relator was appointed, does he have a 'term of office' in a constitutional sense? Clearly no. The statute provides that the Adjutant-General shall be appointed by the Governor, that he shall be military secretary to the Governor and that he 'shall hold office during the term of the Governor and may be removed by him at his pleasure.' If the statute had said he should hold office 'during the term of the Governor' and had broken off at that point we would have a different case to deal with. In such case his term would have the same boundaries as the Governor's term. By referring to this certainty, the term of the Adjutant-General would be made certain and the maxim, id certum est, would control the situation. But the law does not break off there and neither should we in the exposition of it. It goes on to say in the same breath that the Governor may remove him at 'his pleasure.' The Governor's breath, under the law, made him, and the Governor's breath is left to unmake him. The appointing power has left to it the disappointing power unchecked, free of limit in time, place or circumstance. No man who holds office at the pleasure of another can be said to have a certain fixed term of office. The two ideas are radically antagonistic and in right reason they cannot both apply at the same time to the same thing. The Governor's 'pleasure' has no fixed bounds discernible to the judicial eye."

From the above, it will be seen that these deputies have no "term of office." Therefore, to allow them a salary increase during their tenure of office would not violate Section 13 of

Honorable Garner L. Moody

Article VII of the Constitution of Missouri, quoted in the forepart of this opinion. We believe, therefore, that the additional compensation provided by Senate Bill No. 161 should be paid to the deputy circuit clerk and recorder on and after August 29, 1957.

CONCLUSION

It is the opinion of this department that prosecuting attorneys in fourth class counties do not receive any salary increase by virtue of any legislation enacted by the 69th General Assembly; that on and after August 29, 1957, county clerks in fourth class counties are entitled to increased compensation in the sum of \$500 per year; that on and after August 29, 1957, the county superintendent of schools in fourth class counties is entitled to an increase in compensation of \$400 per year; that deputy county clerks in fourth class counties are entitled to \$500 per year additional compensation by virtue of legislation enacted by the 69th General Assembly; that the chief deputy circuit clerk in counties having a population of 15,000 and less than 17,500, shall receive the sum of \$2,280 per year compensation; that the first deputy shall receive the sum of \$2,100 per year; and the second deputy shall receive the sum of \$1,920 per year compensation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:bl;ml

Enc.

ELECTIONS: Upon death of an elected county judge before
COUNTY OFFICERS: assuming office incumbent does not hold over. An
COUNTY JUDGES: appointed judge holds office until the first Monday
next following the first ensuing general election.



February 1, 1957

Honorable J. P. Morgan
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Morgan:

This is in answer to your letter of recent date requesting
an official opinion of this office which reads:

"An opinion based on the following facts
and question is requested by your office.
Otis Hurst, a Democrat, is the present
incumbent Associate Judge of the County
Court from the Western District of
Livingston County. At the last General
Election one Ross Cooper, a Republican,
was elected to take office on January 1,
1957. Mr. Cooper died last week.

"Will the incumbent hold over until the next
General Election or will it be necessary to
have a Special Election?

"It would be appreciated if the answer could
be expedited due to the short period of time."

It is first necessary to determine just what statutes are
relevant to the situation involved. It is, therefore, thought
necessary to here quote from Section 49.050, RSMo 1949, which
is as follows:

"The clerks of the county courts shall certify
to the governor the names of the persons
elected as county judges, and the governor shall
thereupon commission all such persons as judges
of the county courts for their respective terms
for which they may have been elected."

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The next section, which it is felt could be involved in this question, is 49.060, RSMo 1949, said section reads:

"When a vacancy shall occur in the office of judge of the county court, such vacancy shall at once be certified by the clerk of said court to the governor who shall fill such vacancy as provided by law."

Article VII, Section 7 of the 1945 Constitution provides in regard to selection of officers that: "Except as provided in this Constitution, the appointment of all officers shall be made as prescribed by law."

Then Article VII, Section 12 of the 1945 Constitution provides:

"Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

In regard to the tenure of office it is necessary to quote from Section 105.010, RSMo 1949, which reads:

"All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

Further, in Chapter 105 at Section 105.030, it is provided that:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said

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general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election; provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date." (Underscoring ours.)

The above quotations are submitted for the particular purpose of determining whether or not there is any specific difference between the question here involved and the question involved in the case of State v. Mouser, 284 S.W. 2d. 473, in which the circuit clerk-elect died following the election and prior to entering upon the duties of his office or qualifying. The point in that case which is of interest here is best illustrated by quoting at l.c. 477, where the court quotes from the case of Campbell v. Dotson, 111 Ky. 125, 63 S.W. 480, 481, which reads, in part:

"* * * * *

"The term of county offices is fixed at four years. Elections are required to be held every four years to fill these offices. The persons elected enter upon the duties of their offices on the first Monday in January after their election. The term of the officer expires when the term of his successor begins. He holds until the election and qualification of his successor, so that there may always be an incumbent in the office to attend to the public business.* * * * * The aim was simply to prevent an hiatus in the office in case the new officer for any reason failed to qualify. The constitution fixes a definite term for each of these offices, and fixes a definite time when the regular election to fill them shall be held. It also provides for filling vacancies, and requires that these shall be filled by election, except when the unexpired portion of the term is so short as to make this impracticable. The construction urged by appellant is wholly out of keeping with the spirit and purpose

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of the constitutional provision. It is true, appellant holds until the election and qualification of his successor. His successor was elected at the November election, 1897. The person elected having died before the time for him to take possession of the office, the term for which he was elected became vacant, just as much as if he had died after qualifying, but before the time for entering upon the duties of his office; and when Dotson was appointed to fill this vacancy, gave bond, and took the oath, appellant's successor had been elected and qualified, and therefore his right to the office ceased."

We believe that the same rule applies to your question as in this above case and that the incumbent does not hold over. It is believed that a successor to Mr. Hurst, since Mr. Hurst has served his entire term, will have to be appointed and will hold until the first Monday in January next following the first ensuing general election.

CONCLUSION

It is, therefore, the opinion of this office that where a county judge-elect dies between the time of his election and qualification for assuming office, the incumbent judge does not hold over but his successor must be appointed by the Governor to serve until the first Monday in January next following the first ensuing general election.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James W. Faris.

JWF:mw

Yours very truly,

John M. Dalton
Attorney General

STATE TREASURER:
STATE MONEYS:
DEPOSITARY:

Duty of State Treasurer with respect to
investment of state moneys not needed
for current operating expenses.



May 2, 1957

Honorable M. E. Morris
State Treasurer of Missouri
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an
official opinion which reads:

"The amendment to the Constitution of the
State of Missouri, adopted in November,
1956, which repeals and re-enacts Sec-
tion 15 of Article 4, relates to the
State Treasurer and the investment of
state funds. The provision for moneys
subject to check is self-explanatory.

"State moneys not needed for current
operating expenses are to be placed on time
deposit in Missouri banks or invested in
United States Government obligations.

"(1) Is it the legal obligation of the
State Treasurer to obtain the highest
interest rate available or is it correct
to follow the present procedure of keeping
a portion on time deposit in Missouri banks,
subject to 30 days' notice? This type of
money earns interest at the rate of 1% per
annum. The same money in United States
securities at this time would yield 3 plus
per cent.

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"(2) Copy of Senate Bill #29, which has passed the House and Senate and is now awaiting the signature of the Governor, is enclosed. Should the Governor sign this bill, would it alter your opinion in any way with respect to question '1'?"

Since Senate Bill No. 29 has been signed by the Governor, there now is presented the single question as to what is your duty under the Constitution and that bill.

The pertinent provisions of Article IV, Constitution of Missouri, as amended in 1956, read:

"* * *The state treasurer shall determine by the exercise of his best judgment the amount of state moneys that are not needed for current operating expenses of the state government and shall place all such moneys not needed for payment of the current operating expenses of the state government on time deposit, bearing interest in banking institutions in this state selected by the state treasurer and approved by the governor and state auditor or in short term United States government obligations maturing and becoming payable one year or less from the date of issue or in other United States obligations maturing and becoming payable not more than one year from the date of purchase. The investment and deposit of such funds shall be subject to such restrictions and requirements as may be prescribed by law. * * *"

Paragraph 2, Section 30.260, Senate Bill No. 29, reads:

"The State Treasurer shall place the State moneys which he has determined are not needed for current operations of the State government on time deposit drawing interest in banking institutions in this State selected by him and approved by the Governor and the State Auditor, or place them in short term United States government obligations maturing and becoming payable one year or less from the date of issue or in other United States obligations maturing and becoming payable not

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more than one year from the date of purchase, as he in the exercise of his best judgment determines to be in the best overall interest of the people of the State of Missouri, giving due consideration to (a) the preservation of such State moneys, (b) the comparative yield to be derived therefrom, (c) the effect upon the economy and welfare of the people of Missouri of the removal or withholding from banking institutions in the State of all or some such State moneys and investing same in obligations of the United States government, and (d) all other factors which to him as a prudent State Treasurer seem to be relevant to the general public welfare in the light of the circumstances at the time prevailing."

The second sentence of Paragraph 2, Section 30.290, Senate Bill No. 29, reads:

" * * * Good faith compliance by the State Treasurer with paragraph 2 of Section 30.260 shall be a full justification for the action of the State Treasurer in the investment of State moneys although different action by the State Treasurer would have yielded a greater return on the State moneys."

The Constitution provides merely that the moneys determined by the State Treasurer not be needed for current operating expenses shall be either deposited in banks on an interest bearing time deposit basis or invested in stated kinds of Government obligations. It does not purport to prescribe any requirements or standards to guide the State Treasurer in determining which disposition he shall make of such moneys. Instead, by providing that the investment and deposit of the moneys which are not needed for current operating expenses shall be subject to such restrictions and requirements as may be prescribed by law, the Constitution expressly leaves this for later determination by the General Assembly and authorizes that body to take such action as it may deem necessary or appropriate in the light of conditions as they exist from time to time. Pursuant to such authority, the above quoted provisions of Senate Bill No. 29 have been enacted; and, whatever may have been the State

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Treasurer's duty under the Constitution alone and without any express guide for his action, it is now clear that his duty must be ascertained from such statutory provisions.

Senate Bill No. 29 requires, in Section 30.260 (2) that, in determining what disposition to make of the moneys in question, the State Treasurer shall consider various matters in addition to comparative yield. The matters specifically mentioned are "the preservation of such State moneys" and "the effect upon the economy and welfare of the people of Missouri of the removal or withholding from banking institutions in the State of all or some such State moneys and investing same in obligations of the United States government." Also, there is the "catch-all" provision requiring the State Treasurer to consider "all other factors which to him as a prudent State Treasurer seem to be relevant to the general public welfare in the light of the circumstances at the time prevailing."

It is not necessary for the purposes of this opinion to attempt to discuss in detail the matters which the State Treasurer is specifically required to consider or to speculate with respect to those which might be deemed to be relevant under the "catch-all" provision. It will suffice to say that the conclusions which may reasonably be reached on the basis of the matters other than comparative yield may, in some circumstances, at least, be inconsistent with obtaining the highest rate of interest on the moneys.

This was recognized by the General Assembly when it provided that anything other than comparative yield should be considered; and, by requiring consideration of such other matters, the General Assembly clearly provided that it should not, as a matter of law, be the duty of the State Treasurer always to obtain greatest possible return on the moneys. In the exculpatory provision contained in Section 30.290 (2) of Senate Bill No. 29 the General Assembly further emphasized this fact by providing that good faith compliance with the pertinent provisions of Section 30.260 shall be full justification for action of the State Treasurer "although different action by the State Treasurer would have yielded a greater return on the State moneys." The rate of interest, or yield is just one of the matters to be considered by the State Treasurer, and nothing more.

Under Senate Bill No. 29, it is the State Treasurer's duty to take such action "as he in the exercise of his best judgment determines to be in the best overall interest of the people of

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the State of Missouri," after consideration of the matters mentioned above. Broader discretion could hardly have been vested in the State Treasurer. Aside from comparative yield, the matters which are to be considered are of a kind concerning which intelligent, informed persons, with a given state of facts, may honestly reach different conclusions. Also, as already indicated, a conclusion based on one of such matters alone may conflict with those based on the others; and nowhere is there any guide as to the relative weight to be given to the various matters. Where such a conflict exists, it might be determined that the money should be partly deposited in banks and partly invested in Government obligations; but this would not necessarily be true and a weighing of the various considerations might lead to a determination that the moneys should be placed all in time deposits or all in Government obligations. Moreover, there is an ever-changing factual situation, so that determinations which are made must be under constant review. Whatever arguments may be made pro and con with respect to various courses of action, someone must have the responsibility for making final decisions as to what is in the best interests of the people of the State under the facts as they exist from time to time; and the statute places that responsibility on the State Treasurer. When he in good faith exercises his best judgment, and acts according, he has fully performed his duty.

As noted above, Section 30.290 (2) of Senate Bill No. 29 expressly provides that good faith compliance with Section 30.260 (2) shall be full justification for the State Treasurer's action even though a greater return might have been obtained by different action. Thus, it protects the Treasurer against liability based merely upon contentions that some other course of action would have been wiser and more beneficial to the State. In making good faith determinative, the statute is in accord with generally accepted principles which would have been applicable even in the absence of such express provision.

Where such discretion is vested in an official in the executive branch of the government, the courts will not instruct the official as to how he shall exercise such discretion and, in the absence of evidence of bad faith, fraud, or flagrant abuse tantamount to failure to exercise discretion, the courts will not interfere with the official's actions or impose any liability upon him for his actions. As is frequently stated, a court will not substitute its judgment for that of an official vested with discretion merely because it would have reached a different conclusion.

In the case of State ex rel. Shartel v. Westhues, 93 SW2d 612, the Missouri Supreme Court had occasion to consider the

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question as to what authority the courts have with respect to the performance of a discretionary duty by a State official. There the Secretary of State had the duty to arrange for the publication of certain notices and, in doing so, to "accept the most advantageous terms that can be obtained." A suit was brought to require the Secretary of State to take competitive bids for the publication of the notices. The lower court held that in view of the discretion vested in him, the Secretary of State was not required to obtain bids, but the court in its decree went on to tell the Secretary of State in considerable detail how he should exercise his discretion. In its review of the case, the Supreme Court held that the lower court had no such authority and, in its opinion, stated:

"VII. The requirement of section 10402, R.S. 1919, that the officer 'shall accept the most advantageous terms that can be obtained,' imposes upon such officer the right and duty to exercise an official discretion. Respondent held that the secretary of state was under no duty to submit the publication of the proposed constitutional amendments to competitive bidding or even to accept the lowest bid, if any such bids were received. The statute does not define the words 'most advantageous terms.' It left it to the secretary of state to determine for himself what terms are most advantageous and to accept the terms he deems to be most advantageous. The statute has not provided that the advantageousness of the terms offered to the officer shall be determined by the number of readers of the given newspaper, nor by its circulation in a particular county, nor by the price to be charged for the publication, nor by the relation of that price to the maximum price authorized by new Section 10401; nor does section 10402, R.S. 1919, provide at what time the secretary of state shall determine the advantageousness of the terms offered to him, nor even that the secretary of state shall peddle the publication from one newspaper office in the county to another in order to ascertain all or any of these facts. In short, the General Assembly has not defined the words 'most advantageous terms.'

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"Respondent held that the secretary of state had a discretion, which it was his right and duty to exercise. Respondent then proceeded to advise the secretary of state how he should exercise such discretion, to wit:

"That he must exercise that discretion and select those papers that give the widest publicity at rates which are reasonable and in exercising this discretion he must protect the interests of the State financially, as well as otherwise."

"It may be that the secretary of state should take all the things specified by respondent into consideration in exercising his official discretion, but the declaration of his duty in that respect must come from the legislative and not the judicial department of our state government."

* * *

"It cannot be said on this record that the acts and conduct of the secretary of state in proposing (as it is stipulated) 'to designate a newspaper in each county of the state and in the city of St. Louis in which the proposed amendments to the Constitution should be published * * * without taking or receiving competitive bids for such publications or taking or receiving statements from the publishers of such newspapers as to the price to be charged and paid therefor' amount to such fraudulent conduct and abuse of official discretion as to give to the courts the right to control the discretion of the secretary of state. The only facts before us are the stipulated facts just referred to. The secretary of state may have determined from sources other than statements of the publishers of newspapers facts which influenced his official discretion in accepting as most advantageous the terms of such newspapers for publishing the proposed constitutional amendments."

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"Respondent did not find that the secretary of state was about to exercise his discretion fraudulently, so that no discretion would, in fact, be exercised by him, but quite obviously undertook to substitute his judgment for that of the secretary of state as to what consideration should control that officer in the exercise of his official discretion. This the trial court had no power to do. The secretary of state is an officer of a department of the state government, separate and distinct from the judicial department. In the absence of fraud, the exercise of his official discretion cannot be controlled by the judicial department. The legislative department may lay down rules for the guidance of the secretary of state in the performance of this duty, if so advised. Certain it is that the circuit court of Cole county had no power to interfere in the exercise of the discretion intrusted to the secretary of state upon the facts contained in the record before us, which record is stipulated here as the record before respondent when he entered the judgments complained of."

In the statute now under consideration, the General Assembly has directed that the State Treasurer take certain matters into consideration but it has left with him an extremely wide range for exercise of discretion in determining what is in the "best overall interest of the people of the State;" and it seems that clear that, even without the exculpatory provision found in Section 30.290 (2), the courts, following the opinion in case cited above, would not interfere with or review the action of the State Treasurer in the absence of evidence of bad faith.

CONCLUSION

With respect to State moneys not needed for current operating expenses, there is vested in the State Treasurer broad discretion to determine, after consideration of various matters enumerated in the statute, whether it is in the best overall interest of the people of the State of Missouri to place them in interest-bearing time deposits in banks or invest them in specified types

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of United States obligations. Comparative yield is only one of the matters which the Treasurer is required to consider, and it is not his duty, as a matter of law, to obtain the highest rate of interest that is obtainable. The courts will not interfere with or review the action of the State Treasurer, in the absence of evidence of his failure to exercise his discretion in good faith.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Baumann.

Yours very truly,

John M. Dalton
Attorney General

JCB:vlw

BLIND PENSION FUND:
STATE TREASURER:
TRANSFER:

It is the duty of the state treasurer to transfer to the distributive public school fund that portion of the blind pension fund which remained on hand and unappropriated in his custody at the end of the biennium.

May 21, 1957

Honorable M. E. Morris
State Treasurer
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Article 3, Section 38(b) of the Missouri Constitution provides that the balance remaining in the 'Blind Pension Fund' shall be transferred to the 'Distributive School Fund.'

"Section 209.130, R.S.Mo 1949, provides that the balance in the fund be used to pay any pension deficiency which may exist. I presume this may account for the fact that the balance has never been transferred and there is, at this time, a substantial balance in the fund, which has been called to our attention.

"Will you please advise if it is my duty, as State Treasurer, to transfer any or all of this fund, which remained on hand at the end of the biennium and, if so, to what fund."

Article III, Section 38(b) of the Missouri Constitution to which you refer, reads:

"The general assembly shall provide an annual tax of not less than one-half of one cent nor more than three cents on the one hundred dollars valuation of all taxable property to be levied and collected as other taxes, for the purpose of providing a fund to be appropriated and used for the pensioning of the deserving blind as provided by law. Any balance remaining in the fund after the payment of the pensions may be appropriated for the adequate support of the commission for the blind, and any remaining balance shall be transferred to the distributive public school fund."

Section 209.130, RSMo 1949, to which you also refer, reads:

"There is hereby levied an annual tax of three cents on each one hundred dollars valuation of taxable property in the state of Missouri to provide a fund out of which shall be paid the pensions for the deserving blind as herein provided. The tax shall be collected at the same time and in the same manner and by the same means as other state taxes are now collected. The tax, when so collected, shall be paid into the state treasury to the credit of the blind pension fund, out of which fund shall be paid the pension as herein provided or as may be hereafter from time to time provided by the general assembly. If at the end of any one year there shall be a balance in the pension fund in the treasury after the pensions for such year have been paid, the same shall be available so far as may be needed therefor for the payment of pensions for the succeeding year, and pensions may be paid from such balance on the warrant of the state comptroller as in other cases."

It will be noted that the above section of the Constitution (§ 38(b) of Art. III) holds that any residue of money remaining in the blind pension fund after pensions have been paid and the commission for the blind has been adequately supported, shall be "transferred to the distributive public school fund." It should also be noted that there is no statement as to who will make this transfer or when it will be made. The support for the blind pension fund obviously is by appropriation by the state legislature.

It is the transfer to the distributive public school fund with which we are here concerned, whether by the legislature or by the state treasurer.

Section 38(b) of Article III of the Missouri Constitution, supra, uses, as we noted, the word "transfer." This section uses the word "appropriate" and "appropriated" for acts which clearly are to be done by the legislature.

To find definitions of "appropriate" appears not to be easy. We note the case of State v. Parsons, 69 Pac. 2d 788, which at page 791 reads:

"* * * In Epperson v. Howell, 28 Idaho, 338, at page 343, 154 P. 621, 623, this court defined 'appropriation,' as meant by section 13, article 7, supra, and said: 'An appropriation, within the meaning of the section of our Constitution last above quoted, is authority from the Legislature, expressly

given in legal form to the proper officers, to pay from the public moneys a specified sum and no more, for a specified purpose and no other. It follows that no money may lawfully be paid from the treasury except pursuant to and in accordance with an act of the Legislature, expressly appropriating it to the specific purpose for which it is paid.* * *

We also note the following portion of Section 33.080, RSMo 1949, which reads:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the general assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the constitution of this state), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer.* * *"

From the underscored portion of Section 33.080, supra, we see that the word "transferred" does refer to an act by the state treasurer in the instance which is the subject of the above section.

From the above, we believe we are justified in concluding that the word "transfer" does not necessarily refer to an act of the legislature but indeed that it more probably does not so refer.

We also note that Section 15 of Article IV of the Constitution of Missouri makes the state treasurer custodian of all state funds which, as you state in your letter, you are in the matter of the funds here under consideration. It would therefore seem that since the state treasurer is the custodian of this fund and since only he could make the transfer that he would be the person to do so, and that this he would do if Section 38(b) of Article III of the Constitution, supra, is self-enforcing, which we be-

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lieve it to be.

In the case of *State v. Smith*, 194 S.W.2d 302, at l.c. 304 et seq., we find a rather thorough discussion of when a constitutional provision is or is not self-enforcing. That portion of the opinion reads:

"We are of the opinion that the mooted constitutional provision, the text of which is set forth in the margin, is not subject to the foregoing construction. 'One of the recognized rules is that a constitutional provision is not self-executing when it merely lays down general principles, but that it is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative enactment. * * * Another way of stating this general, governing principle is that a constitutional provision is self-executing if there is nothing to be done by the legislature to put it in operation. In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.' 11 Am. Jur., Constitutional Law, § 74, pp. 691, 692. See, also, 16 C.J.S., Constitutional Law, § 48, pp. 98-101."

Also, in the case of *State v. Wymore*, 119 S.W.2d 941, at l.c. 947, the court stated:

"* * * The rule is stated in *State ex inf. Norman v. Ellis*, 325 Mo. 154, loc. cit. 160, 28 S.W.2d 363, loc. cit. 365, as follows:

"'It is within the power of those who adopt a constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect.* * *

"'Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment

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of a right given, or the enforcement of a duty imposed.' * * *

"'A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficacy and operation on the legislative will.' 12 C.J. pp. 729, 730."

Section 38(b) of Article III of the Constitution comes within the purview of the above definitions of a constitutional provision which is "self-enforcing" we believe. Its provisions are specific; it would appear to be the intention of the framers of the Constitution that it have immediate effect; its provisions can be carried out without implementation by an act of the legislature.

In view of the fact that we believe Section 38(b) of Article III of the Constitution is self-enforcing; and of the further fact that we believe the word "transferred," as used in the above section, does not necessarily refer to an act of the legislature but more probably does not so refer; and in view of the final fact that the state treasurer has custody of the fund in question and that only he could make the transfer, we believe that it is his duty to make the transfer to the distributive public school funds under the circumstances set forth by you.

CONCLUSION

It is the opinion of this department that it is the duty of the state treasurer to transfer to the distributive public school fund that portion of the blind pension fund which remained on hand and unappropriated in his custody at the end of the biennium.

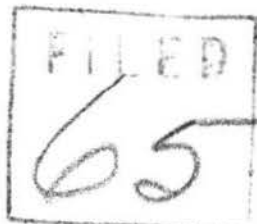
The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lcl:ld

CHILDREN: A lawyer may perform all of the necessary legal
PLACEMENT: services involved in the transfer of the custody
LAWYERS: of a child and not be in violation of Section
210.211, RSMo 1949; it is the further opinion of
this department that such a lawyer is not in
violation of the above section even though he
had knowledge that placement had been made by
a person not authorized to do so.



January 31, 1957

Honorable Samuel B. Murphy
Representative, Ninth District St. Louis County
300 Gill Avenue
Kirkwood 22, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I refer to the opinion given by you under date of May 29, 1956 to the Hon. Proctor N. Carter, Director of Welfare, with reference to the placement of children by unlicensed persons in violation of Section 210.211 R.S.Mo. Cum. Supp. 1955. In that opinion you hold that any unlicensed person, including a doctor, lawyer or nurse, who assists in placing even one child in a home or institution, is in violation of this law and is subject to prosecution under Section 210.245 of the same Act.

"This opinion has caused considerable concern to the legal profession, as a whole, since it is not clear as to what is meant by the words 'who assists in placing' a child.

"Specifically, I would like your answer to the following questions:

"1) Is a lawyer who performs professional legal services in preparing the papers for the transfer of custody of a child from the natural parent or parents to another individual and who files such papers in

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the Juvenile Court and obtains the order for transfer of custody, in violation of Section 210.211, if -

"a) He did not participate in any way in the actual placement of the child and had no knowledge at the time that he performed such legal services that such child had been placed by an unlicensed person; or

"b) He did not participate in the actual placement of the child but did have knowledge that such child had been placed by an unlicensed person.

"2) Is a lawyer who performs professional legal services in preparing the papers for the adoption of a child and who files such papers in the Juvenile Court and obtains a decree of adoption, in violation of Section 210.211, if -

"a) He did not participate in the actual original placement of the child but at the time of the performance of such legal services did have knowledge that such original placement had been made by an unlicensed person."

We direct your attention to the case of Goodman v. District of Columbia, 50 Atl.2d 812. The facts in that case are thus stated in the opinion (l.c. 812, 813):

"Appellant was associated as counsel for a woman who was separated from her husband and who was being sued for divorce in Rhode Island on the ground of adultery. She was eager

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that the divorce be granted and so she was advised to let the case go by default. At their first conference she revealed that she was pregnant by a man other than her husband, and asked appellant to find someone who would provide a good home for her child when born, and adopt it. He advised her to go to a welfare agency or to a certain infants' home of her religious denomination. She rejected this advice because she had herself been in an orphanage and did not wish her child brought up in such an institution; she insisted on having it placed in a private home.

"Appellant told her that if he heard of any suitable potential foster parents he would let her know. She phoned him persistently at his home and office several times a week to inquire if he knew of anyone who would take her child. Finally when she called him about two months before the child was born he told her that he had learned of a couple interested in adopting the child, and he would have them contact her; she told him she preferred to remain anonymous and did not want to know the names of the prospective parents. Thereupon, as the transcript recites, appellant 'offered to talk to the prospective adopters, report to her, and to otherwise conclude the matter for her so that the parties would not have to meet face to face.' And so it was agreed that appellant should come to the hospital after the confinement and arrange for the transfer of the

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child. The mother had in the meantime instructed the hospital to permit the couple to see the child. The couple had through their own physician obtained from the mother's physician a satisfactory report as to her physical condition. After the child was born appellant took a release agreement to the hospital which he read to the mother in the presence of two of her friends and which she willingly signed. When she was ready to leave the hospital, appellant went there, took the child from her, and physically delivered it to the adopting father who was waiting at the front door of the hospital, while the mother left by a side door. The couple later adopted the child through court proceedings in Maryland.

"Appellant charged the mother nothing in the divorce case and refused to accept any fee for his services in connection with placing the child for adoption. He did, however, accept about one-third of \$294.90, which he had collected from the adopting couple to cover the mother's medical expenses.

"The mother later changed her mind and sought appellant's services in regaining custody of the child. He refused, saying that he 'could not accept such an assignment in good conscience and that the child had probably been adopted.' Not long afterwards a complaint was filed against appellant with the Board of Public Welfare on the ground that he had no license to place children for adoption. Such complaint resulted in the prosecution and conviction which are here under review."

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The acts for which the appellant was prosecuted are set forth in the opinion (lc. 813):

" 'Any person, firm, corporation, association, or public agency that receives or accepts a child under sixteen years of age and places or offers to place such child for temporary or permanent care in a family home other than that of a relative within the third degree shall be deemed to be maintaining a child-placing agency.' Code 1940, § 32 - 782.

and followed it with this later provision:

" 'No person other than the parent, guardian, or relative within the third degree, and no firm, corporation, association, or agency, other than a licensed child-placing agency, may place or arrange or assist in placing or arranging for the placement of a child under sixteen years of age in a family home or for adoption.' Code 1940, § 32 - 785."

The court declared the law to be thus (l.c. 814):

"What the appellant did is very clear. He 'arranged' and 'assisted' in placing and personally consummated the placement of the child. He was the intermediary who produced the prospective adopters and arranged contact (indirect though it was) with the mother. He it was who presented to the mother the document for release of her child and obtained her signature. He it was who arranged for the presence of the adopting parents at the hospital. And he it was who performed the final act

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of placement by accepting the child from the arms of its mother and physically handing it over to the adopting father. It would be difficult to imagine a more clear-cut infraction of the letter as well as the spirit of the law.

"That appellant did these things without compensation, that he was animated by the most humane motives, that he was perhaps imposed upon by the mother or yielded in sheer pity to her cries of distress - all this we may concede. And all this appeals to our sympathy for him; but it cannot justify us in holding that his acts were within the law.

"If appellant were proceeding on the assumption that he, as a lawyer, had a right to place the child for adoption, though he was unlicensed for that purpose, he was mistaken. We look in vain for any token of intention within the statute that the placing of babies by lawyers should be in any different or forgiven status than such placing by citizens in any other class. No court has said that such statutes do not apply to lawyers. No scrutiny of the sections involved can yield up such an exemption by mere process of judicial construction. If it could, the courts might just as properly create a whole series of exemptions; and before long the process of erosion by judicial construction would be complete and the Act ineffective.

"We are told that if defendant is not

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absolved, no lawyer can feel safe when he is called on to advise or act in an adoption case. Even if that were so we could not help it; we would have to apply the statute as it is written. But we think the careful lawyer will have little trouble in determining what he may lawfully do in such situations. We think even a cursory reading of the statute will tell him how far he may go and where he must stop.

"We think it plain that so long as the lawyer gives only legal advice; so long as he appears in court in adoption proceedings, representing either relinquishing or adopting parents; so long as he refrains from serving as intermediary, go-between, or placing agent; so long as he leaves or refers the placement of children and the arrangements for their placement to agencies duly licensed, he is within his rights under the statute. If that were all this appellant had done his conviction could not stand. It is plain he has done much more. Blameless though he is by ordinary standards of professional ethics, he has run afoul a statute which declares his actions malum prohibitum."

In view of the above we believe that the answer to your first question (1(a)) is clearly in the negative, that is to say, that the lawyer would not be in violation of Section 210.211, RSMo 1949, for doing the things which are set forth in the above question.

And now as to your second question (1(b)). We do not believe that in the fact situation which you set forth that the lawyer could be an accessory after the fact or an ac-

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complice to the misdemeanor to another and unauthorized person placing a child. Therefore, the lawyer is a principal in the misdemeanor or he is nothing. We must, therefore, seek to find what constitutes a "principal" in a misdemeanor.

The case of *Pendley v. State*, 158 S.W. 811, holds that "In order to be a principal accused must be connected with the original taking and if he was not present at the time of the theft, but advised it, and the hogs were taken pursuant to his advice, he would be an accomplice."

In the case of *Melton v. State*, 58 S.W. 2d 103, the court holds that the prime distinction between a principal and an accomplice is that the law requires a principal to be present at the commission of the offense.

In the case of *People v. Armstrong*, 114 N.Y. 2d 871, the court held that "One who acts with another at one and the same time in pursuance of a common design . . . is a principal."

In the case of *McQuire v. State*, 60 S.E. 2d 526, the court held that "All who aid and abet in the commission of a misdemeanor, as well as those who immediately perpetrate it are principals."

In the case of *Commonwealth v. Giacobbe*, 19 Atl. 2d 71, at l.c. 75, the court held:

"It is true, as defendant asserts, that mere knowledge of the perpetration of a crime does not involve responsibility for its commission, nor does silence following such knowledge make one an accomplice or an accessory after the fact. *Commonwealth v. Loomis*, 267 Pa. 438, 444, 110 A. 257, 258, 259; *Commonwealth v. Mazarella*, 279 Pa. 465, 472, 124 A. 163, 165; *Commonwealth v. Guild*, 111 Pa. Super, 349, 352, 353, 170 A. 699, 700."

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In the case of State v. Potter, 19 S.E. 2d 257, the court held that to be an accessory after the fact one need only aid criminal to escape arrest and prosecution, but one merely failing to give information as to the crime which he knows has been committed does not make him a principal.

The case of State v. Naughton, 120 S.W. 53, holds that an accessory after the fact is one who, knowing that a felony has been committed, assists the felon.

In view of the above it would seem clear to us that in a misdemeanor case such as the one under consideration that the attorney who has knowledge that the child has been placed by an unauthorized person and who simply does the legal work necessary to bring about the adoption could not, by any stretch of the imagination, be held to be a principal to the misdemeanor.

We might point out, furthermore, that in these cases the lawyer represents not the person who placed the child but who was not authorized to do so, but that he represents the adopting parents.

Although, as we have stated above, we do not believe that a lawyer who simply does the legal work necessary to effect an adoption in a case where he knows the child to have been placed by an unauthorized person could be prosecuted as a principal to a misdemeanor, we do believe that a case of legal ethics might well be involved, and for a lawyer to do this would be acting in a manner not wholly compatible with the high standards of the legal profession.

We feel that your question (2(a)) is answered by our answer above.

CONCLUSION

It is the opinion of this department that a lawyer

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may perform all of the necessary legal services involved in the transfer of the custody of a child and not be in violation of Section 210.211, RSMo 1949; it is the further opinion of this department that such a lawyer is not in violation of the above section even though he had knowledge that placement had been made by a person not authorized to do so.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

LOTTERY: A contest in which contestants are to complete a statement as to why they prefer the products of a particular dairy, the winner of which contest will be awarded a valuable prize, constitutes the elements of "chance," "prize," and "consideration," and is, therefore, a lottery and contrary to the laws of this state.

October 21, 1957

OPINION NO. 65

Honorable William C. Myers, Jr.
Prosecuting Attorney
Jasper County
318 Joplin Street
Joplin, Missouri



Dear Sir:

Your recent request for an official opinion reads:

"This office has received a complaint against the Adams Dairy Farm customer contest. A competing dairy contends that it is quite similar to the 'Knocking Man' scheme which was ruled to be a lottery and prohibited by the laws of the State of Missouri in your opinion of August 29, 1955.

"I am enclosing a copy of a letter received by this office from Adams Dairy Farm setting out the nature of the contest together with a copy of the newspaper advertisement appearing in the Joplin News Herald on August 26, 1957, and an advertisement announcing one of the winners as it appeared in the Springfield Daily News of August 30, 1957.

"I would appreciate your opinion on the legality of the Adams Dairy Farm Contest at your earliest convenience."

The scheme in question is set forth in the third paragraph of the letter to you from the Adams Dairy Company. This paragraph reads:

"Briefly, the plan is simply a customer contest whereby the customer is invited to submit letters in fifty words or less stating why they like Adams

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Milk. Many of these letters come in written in poetry, prose, some are even decorated. They are judged by our advertising agency for the best letter, and the winning letter is used in our newspaper advertising, along with a picture of the winner. She in turn receives coupons equal to a year's supply of milk good at any grocery store. Each coupon is redeemable for one quart. The amount of coupons, I believe, represents 178 quarts of milk. This figure was based on an article in the Wall Street Journal recently, which said the average person uses 178 quarts a year."

We note you refer to our opinion of August 29, 1955, to John R. Martin, Assistant Prosecuting Attorney of Jasper County, and its applicability to the situation which you set forth.

We do not consider that this opinion, called by you the "knocking man" opinion is wholly applicable in your situation inasmuch as in that opinion, in regard to the element of "chance" we stated that this element was inherent in the scheme because it was involved in the matter of a person being called up at their home, and of their having any of the products of the Puritan Dairy on hand, both of which elements were necessary in order to participate. In the situation which you present the field is much wider inasmuch as all readers of the Joplin paper, in which the advertisement of the contest appears, are apprised of the contest and have an opportunity to compete as well as all persons into whose hands, either by chance or design, a copy of the paper comes.

We do believe, however, that an opinion rendered by this department on September 19, 1952, to Don Kennedy, Prosecuting Attorney of Vernon County, a copy of which opinion is enclosed, is applicable to your situation. A reading of the "knocking man" opinion, a copy of which is enclosed for your immediate convenience, and the aforesaid opinion to Don Kennedy, make it amply plain that in the situation which you present, two of the three necessary elements which go to constitute a lottery are present, to-wit, "prize," and "consideration." The only question which is presented is whether the third necessary element, to-wit, "chance," is also present. The reason why there could be any doubt regarding this matter is whether or not the element of skill is greater than the element of "chance" in completing the written statement as to why the person competing prefers the products of the Adams Milk Company. It might, as we said, be argued that skill would determine the winner.

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We do not believe that such would be the case in the situation which you present. This matter is very fully discussed in the Kennedy opinion, and the doctrine prevailing in this respect in the United States is set forth. In that opinion we held that although some element of skill and learning was present in answering the questions which were asked of the contestants, that yet "chance" was dominant. We feel that this would be even more true in the situation which you present. The contest advertisement states that all entries will be judged "by an impartial judging agent." There is no indication as to the ability of this agency to judge the statements which will be submitted to it; no standard of excellence is set up and there is no indication that the winners would not be determined upon the basis of individual bias and caprice of the judges.

CONCLUSION

It is the opinion of this department that a contest in which contestants are to complete a statement as to why they prefer the products of a particular dairy, the winner of which contest will be awarded a valuable prize, constitutes the elements of "chance," "prize," and "consideration," and is, therefore, a lottery and contrary to the laws of this state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW/vlw/ld

STATE PURCHASING AGENT:
DEPARTMENT OF CORRECTIONS:
DIVISION OF PENAL INSTITUTIONS:

The State Purchasing Agent is not required to secure bids where the articles to be purchased for the state, or any institutions thereof, can be obtained from the Division of Prison Industries.

FILED

66

February 5, 1957

Honorable Edgar C. Nelson
State Purchasing Agent
Capitol Building
Jefferson City, Missouri

Dear Mr. Nelson:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"Last week I attended a conference called by Colonel Carter, Director of the Department of Corrections, for the purpose of acquainting the business managers of our various correctional and eleemosynary institutions as to the various categories of prison-made goods now available for purchase by such institutions.

"During the discussion I advised the business managers that new legislation passed by the last General Assembly (House Bill No. 377) directs me, the state purchasing agent, to buy no goods from private vendors which can be supplied by the penitentiary industries.

"The various institutions affected by this legislation have been provided with a complete list of all prison-made items now available. This list will be added to from time to time as more items become available.

"I advised the business managers that when they were in need of any such prison-made items they should order it direct from the prison industries by using our Departmental Direct Order form which serves a dual purpose, namely, requisition and purchase order combined.

"One or two of the business managers insisted that they should use our regular requisition form and ask

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for bids from private vendors as well as getting quotations from the prison industries in order that they might have competitive prices.

"I contend that the law very clearly states in Section 37, Paragraph 2, that 'No article so manufactured shall be purchased from any other source for the state or public institutions of the state unless the division of prison industries shall certify that the articles included in the requisition cannot be furnished or supplied within sixty days, or, in the event the same articles cannot be procured on the open market within sixty days, that the division cannot supply them within a reasonable time and no claims for the payment of such articles shall be audited or paid without this certificate. One copy each of the requisition or certificate shall be retained by the department.'

"In this connection, the same Section, Paragraph 3, says: 'The division of prison industries shall fix and determine the prices at which articles so manufactured shall be furnished, and the prices shall be uniform to all.'

"Further, if any institution is dissatisfied as to style, design, prices or quality of any prison-made articles furnished them, Paragraph 40, Section 37, provides for an appeal to a board of arbitrators.

"In brief, it is my contention that I must buy any prison-made article needed by any institution without asking for competitive prices from private vendors.

"I would appreciate an opinion on the proper procedure for me as State Purchasing Agent in such matter."

Section 216.510 RSMo Cum. Supp. 1955, relating to the sale of articles manufactured in the penal institutions of the state to the various institutions owned or controlled by the state and the various political subdivisions, provides as follows:

"1. All articles manufactured in the penal institutions of the state and not required for use therein may be furnished to the state, to any public institution owned, managed or controlled by the state

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or to any political subdivision of the state, or to any institution thereof at such prices as shall be determined as herein provided upon the requisition of the proper official or purchasing agent.

"2. No article so manufactured shall be purchased from any other source for the state or public institutions of the state unless the division of prison industries shall certify that the articles included in the requisition cannot be furnished or supplied within sixty days, or, in the event the same articles cannot be procured on the open market within sixty days, that the division cannot supply them within a reasonable time and no claims for the payment of such articles shall be audited or paid without this certificate. One copy each of the requisition or certificate shall be retained by the department.

"3. The division of prison industries shall fix and determine the prices at which articles so manufactured shall be furnished, and the prices shall be uniform to all.

"4. Any differences between the division of prison industries and the state, its agencies, institutions or the political subdivisions of the state as to style, design, price or quality of articles shall be submitted to arbitrators whose decision shall be final. One of the arbitrators shall be named by the division, one by the office, department or institution concerned, and one by agreement of the other two. The arbitrators shall receive no compensation but their necessary expenses shall be paid by the office, department or institution against which the award is given."

It should be noted that the state or any institutions thereof shall not, under the above provision, purchase any article manufactured in the penal institutions from any other sources unless the division of prison industries shall certify that the articles cannot be furnished or supplied within sixty days, or if the same articles cannot be procured upon the open market within sixty days, then the division shall certify that the division cannot supply them within a reasonable time.

The purchase of articles manufactured by the division of prison industries by the state or any institution thereof is to be upon requisition of the state purchasing agent.

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The provision above noted would seem to be clear and unequivocal in requiring that the state and the various institutions thereof purchase, as their needs require, the various articles manufactured by the state penal institutions, unless they first obtain a certificate from the division of prison industries, as above referred to. Indeed, the law clearly states that no claim for payment shall be audited or paid without said certificate.

Having observed the duty of the state and the various institutions thereof to purchase articles from the penal institutions, upon requisition of the state purchasing agent, we now turn to what is popularly referred to as the State Purchasing Agent Act, Chapter 34, RSMo 1949. Section 34.090 thereof provides as follows:

"If any law shall provide that the state shall purchase for its own use the products manufactured by any institution of the state or shall give preference to the products of any such institution, the provisions of this chapter shall be deemed modified to permit the purchasing agent to purchase such products or give such preference in any manner prescribed by such law."

The legislature saw fit to provide that the provisions of the state purchasing agent law should be deemed modified to permit the purchasing agent to purchase for the state products manufactured by any institution of the state. Therefore, we are of the opinion that the provisions of Section 34.040 RSMo 1949, requiring the purchases to be made on competitive bids, is inapplicable where the articles desired can be obtained from the division of prison industries.

A like conclusion, holding that the provisions of the state purchasing agent law were inapplicable to purchases made from the state under similar statutory direction, was reached in an opinion of this office to R. L. Chapman, Superintendent of Industries, under date of March 26, 1935. A copy of said opinion is attached hereto.

CONCLUSION

Therefore, it is the opinion of this office that the state purchasing agent is not required to secure bids where the articles to be purchased for the state or any institutions thereof can be obtained from the division of prison industries.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/ld

enc. (1)

DECEASED CONVICTS:
DUTIES OF WARDEN:
PROPERTY OF DECEASED
CONVICTS:
ADMINISTRATION OF ESTATES
OF DECEASED CONVICTS:

(1) The Warden of the Penitentiary is not authorized to deliver property of a deceased convict over to the family or relatives of said deceased convict; such delivery must be made pursuant to the laws of administration of estates.
(2) The venue is to be determined in each particular case as provided in Sec. 473.010, Cum. Supp. 1955.



February 26, 1957

Honorable E. V. Nash, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Mr. Nash:

We have your letter of January 29, 1957, in which you have requested an opinion as set out below:

"It is requested that this office be furnished an official opinion concerning the following:

a. An inmate of this institution dies leaving money credited to his account in the institution's treasury. Does the Warden have the authority to withdraw this money and deliver it to the family or relatives or must such authority for withdrawal and designation of beneficiary originate in the Probate Court of Cole County, Missouri?"

Except for Chapter 460 RSMo 1949, there are no statutory provisions, specifically applicable to deceased convicts, setting forth the procedure of distribution of the property of said parties who are incarcerated at the time of death and who leave money credited to their accounts in the institution's treasury. Section 460.230 directing the trustee to deliver the property of the deceased convict over to the personal representative of the deceased is applicable only in those instances where a trustee has been appointed pursuant to Sections 460.010 and 460.020, and, where said trustee has been entrusted with the care and control of the particular property involved. Further, when an appointment of trustee has been made pursuant to the provisions in Chapter 460, the property, upon the death of the convict, must be delivered over to the personal representative of the deceased party, such provisions clearly indicating that the handling of the property by the trustee upon the death of the

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convict does not dispense with the necessity of administration of the estate since it directs the property to be turned over to the "personal representative" of the deceased, the term "personal representative" meaning executor or administrator.

Although there are provisions in the Probate Code (Sections 473.090, 473.093, 473.097 and 473.103, Cum. Supp. 1955) obviating the necessity of administration in cases where, generally, the estate is small, and which provisions may well apply to the particular estate in question, it is contemplated therein that the proceedings originate in the court and that the distribution under said sections be subject to the jurisdiction of the court for, in Sections 473.090 and 473.093, it is discretionary with the court as to whether or not administration of the estate shall be dispensed with and in the latter two sections an affidavit must be filed with the court showing the existence of certain facts. In other words, the distribution of the proceeds of any estate is subject to the jurisdiction of the court. Supporting this conclusion is the following language from 21 Am. Jur. 377, Section 15:

"Theoretically, administration on a decedent's estate is necessary in all cases, because the title to the personalty does not descend to the next of kin and without administration there would be no legal authority to represent the estate in litigated matters or to collect the assets and apply them to the payment of debts. Administration is perhaps always necessary where the decedent leaves an infant as next of kin or heirs who do not have the legal capacity to agree to a distribution because none but an administrator can bind such heirs in any matter respecting the settlement of the estate. Nevertheless, administration may, under some circumstances, be dispensed with. Since, however, the administration of decedents' estates is purely statutory, an agreement to distribute a decedent's estate without obtaining letters of administration may be prohibited by statute. * * *

Even though it might be more practical in some cases for the Warden to deliver over the property of a deceased convict to the family or relatives of the deceased party, in the absence of any law providing for the same, the estate of said deceased

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party must be administered pursuant to the provisions of the Probate Code as indicated earlier in the opinion.

Another question raised in the opinion request is that of venue. Although it is not necessary to determine this question, this being a matter of concern to the creditors and prospective distributees of the deceased party, and further, the facts in the opinion request being too insufficient from which to determine the venue, inasmuch as there has been a change in the law with respect to such since this office rendered an opinion on the same, this question will be considered and passed on, generally, in this opinion.

The applicable statute is Section 473.010, Cum. Supp. 1955, which reads as follows:

"1. The will of any decedent shall be probated and letters testamentary or of administration shall be granted:

(1) In the county in which the domicile of the deceased is situated;

(2) If he had no domicile in this state at the time of his death and was possessed of lands, in the county in which the land or the greater part thereof lies;

(3) If the decedent had no domicile in this state and was not possessed of lands, in any county in which is located any part of his estate which is subject to administration under the laws of this state;

(4) If the decedent had no domicile in this state and left no property therein in any county in which the granting thereof is required in order to protect or secure any legal right.

"2. If proceedings are commenced in more than one county, they shall be stayed except in the county where first commenced until final determination of venue in the county where first commenced. The proceedings are deemed commenced by the filing of an application for letters; and the proceeding first legally commenced extends to all of the property of the estate in this state, subject to the provisions of section

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473.667.

"3. All orders, settlements, trials and other proceedings pertaining to any estate shall be had or made in the county in which the letters were granted."

From examining said statute it is apparent, immediately, that venue will depend upon the facts of each particular case, the only real problem involved in interpreting said statute being a construction of the term "domicile" with reference to persons involuntarily confined. The term "domicile" has been defined as the place where man has true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has intention of returning -- In re Ozias' Estate, 29 SW 2d 240, not for a mere special or temporary purpose, but with the present intention of making a permanent home, for an unlimited or indefinite period -- In re Schultz' Estate, 316 Ill. App. 540, 45 N.E. 2d 577.

A prisoner's domicile would be that which he had immediately before confinement. The principle is stated in 28 C.J.S., Sec. 12, Note 7, as follows:

"Generally, a person's domicile is not changed by involuntary confinement in a penitentiary or other prison, but in such case his former domicile remains. Accordingly, a pauper prisoner retains his former settlement or domicile."

With the above principle and definition in mind, the determination of venue merely entails an application of the provisions of Section 473.010, supra, to the particular case involved. By way of illustration, the venue of the administration of the estate of a person whose domicile was in Greene County, Missouri, at the time of his confinement and whose death occurred while said party was incarcerated in Cole County, Missouri, would be in Greene County, Missouri, and not in Cole County, Missouri.

CONCLUSION

It is therefore the opinion of this office that: (1) the Warden of the Penitentiary is not authorized to deliver property of a deceased convict over to the family or relatives of said deceased convict; such delivery must be made pursuant to the laws of administration of estates; and (2) the venue is to

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be determined in each particular case as provided in Sec.
473.010, Cum. Supp. 1955.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Henry.

Very truly yours,

John M. Dalton
Attorney General

HLH:hw

SCHOOLS: Illegal for school district to pay for transportation of children in vehicles not meeting regulations adopted by State Board of Education, regardless of whether district receives state aid.



December 9, 1957

Honorable William E. Neff
Prosecuting Attorney
Benton County
Warsaw, Missouri

Dear Mr. Neff:

This is in response to your request for opinion dated September 25, 1957, which reads as follows:

"The question has arisen: can the directors of Lutjen School District, No. 37, legally pay a person under contract to transport the pupils of the district if the vehicle used for transportation fails to pass inspection by the Highway Patrol under the direction of the State Department of Education because of the absence of proper signal lights as specified in Missouri Pupil Transportation, Laws, Regulations and Standards, Publication No. 73, Revised edition 1957?

"Lutjen School District, No. 37, Benton County, Missouri, is a three-director district. The school has been closed and the pupils transported to a nearby school for several years. Under the recently passed School Money Apportionment Law the above school district does not qualify for state apportionment.

"The only money which the district has to pay its transportation and tuition costs is that money received from local taxes, railroad and utilities, interest, fines, and forfeitures, and foreign insurance.

Honorable William E. Neff

"The point in question is, since this district receives no State Money, must the vehicle used for transportation meet all requirements before any district money can be legally paid for transportation services.?"

Section 304.060, RSNo 1949, provides:

"1. The state board of education shall adopt and enforce regulations not inconsistent with law to cover the design and operation of all school busses used for the transportation of school children when owned and operated by any school district or privately owned and operated under contract with any school district in this state, and such regulations shall by reference be made a part of any such contract with a school district. Every school district, its officers and employees, and every person employed under contract by a school district shall be subject to such regulations. The state board of education shall cooperate with the state highway department and the state highway patrol in placing suitable warning signs at intervals on the highways of the state.

"2. Any officer or employee of any school district who violates any of the regulations or fails to include obligation to comply with such regulations in any contract executed by him on behalf of a school district shall be guilty of misconduct and subject to removal from office or employment. Any person operating a school bus under contract with a school district who fails to comply with any such regulations shall be guilty of breach of contract and such contract shall be canceled after notice and hearing by the responsible officers of such school district."

Honorable William E. Neff

Pursuant to the authority conferred by that section, the State Board of Education has formulated regulations which are to be found in the pamphlet entitled, "Missouri Pupil Transportation; Laws, Regulations and Standards, Revised Edition 1957, Publication No. 73." The minimum standards for signal lamps are set out in that publication, at page 43, et seq.

By the express terms of Section 304.060, supra, the regulations above referred to are made a part of every contract entered into by a school district for the transportation of school children, regardless of whether the district is the recipient of state aid. It is made the obligation of the school board to afford the contractor a hearing after notice, and if it is found that he has violated these regulations, to cancel his contract.

CONCLUSION

It is therefore the opinion of this office that vehicles used for the transportation of school children must meet the regulations governing pupil transportation adopted by the State Board of Education before a school district can legally pay out money to a contractor providing such transportation, regardless of whether the district receives state aid.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

LABOR UNIONS:
COUNTY HIGHWAY COMMISSION:
COLLECTIVE BARGAINING:



Under provisions of Constitution of 1945, and Revised Statutes of Missouri 1949: (1) Employees of county highway commission may organize a labor union. (2) County court cannot enter into collective bargaining with such union. (3) County court cannot enter contract of employment with such union.

March 15, 1957

Honorable W. H. S. O'Brien,
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Mr. O'Brien:

This department is in receipt of your recent request for a legal opinion reading in part as follows:

"Mr. Perry Bud Richardson, International Representative and Organizer of the 'International Union of Operating Engineers', has come before the County Court of Jefferson County and has stated that his union has been authorized by a majority of the employees of the Jefferson County Highway Department to represent those employees in negotiating a labor contract. The County Court requested me to represent them and render legal advice to them in this transaction. On behalf of the County Court I requested the union to provide us with whatever legal authority they might have authorizing a County Court to take action in this regard. The County Court was furnished with an opinion written by a lawyer representing that particular union, a copy of the entire opinion is enclosed herein.

"Will you kindly render an opinion on the following issues:

1. Under the constitution and statutes of this State can employees of a County Highway Department organize or become members of a labor union?
2. Under the constitution and statutes of Missouri may a County Court enter into collective bargaining with a labor union which represents the employees of a County Highway Department?
3. Under the constitution and statutes of this State may the County Court enter into and execute a con-

tract of employment with a labor union which represents the employees of the County Highway Department?"

The County Highway Department is referred to in each of the three inquiries of the opinion request, although our research fails to disclose any statutory authority for the highway department in any of the counties of Missouri. We do find that Chapter 230 RSMo 1949, pertains to the establishment of a county highway commission, its powers and duties.

Section 230.080 RSMo 1949, empowers the county highway commission to employ technical and other help as may be deemed necessary for the administration and enforcement of the chapter. We assume that where the county highway department is mentioned in the opinion request, such references were intended to refer to the county highway commission, and we shall so treat them in the course of our discussion.

We construe the first inquiry to ask if the constitution and statutes of Missouri authorize employees of a county highway commission to organize and become members of a labor union. The only provisions of the Missouri Constitution of 1945 referring to organized labor and collective bargaining are those found in Article I, Section 29, and read as follows:

"Organized labor and collective bargaining.--
That employees shall have the right to organize
and to bargain collectively through representatives
of their own choosing."

It is noted that the above-quoted constitutional provision does not specifically refer to any particular kind or class of employees, and upon first thought it would appear that the section could be reasonably construed as affording employees of every kind or class the rights therein guaranteed. However, for reasons hereinafter given, it is believed that public employees of a county highway commission have the legal right to organize labor unions the same as employees in private industry, but such public employees do not have the right to enter into collective bargaining negotiations and contracts of that nature in the same manner as other employees.

The principle of law, that public employees of a city have the right to organize labor unions, although they do not have the right to bargain collectively with their employers, was upheld by the Supreme Court of Missouri, sitting in banc, in the case of City of Springfield v. Clouse et al., 206 SW2d 539. This was a declaratory judgment action seeking to determine the city's power

to enter into collective bargaining agreements with a labor union composed of city employees, and concerning wages, hours, collection of union dues and working conditions. The trial court reached a decision that Article I, Section 29 of the Missouri Constitution of 1945, applies to municipal employees, i.e., such employees had the right to organize labor unions, but the city was unauthorized to enter into collective bargaining agreements with representatives of such union. In reviewing the action of the trial court the Supreme Court, in discussing the issues involved, said at l.c. 542, 543 and 545:

"This ruling does not mean, as defendants' counsel seem to fear, that public employees have no right to organize. All citizens have the right, preserved by the First Amendment to the United States Constitution and Sections 8 and 9 of Article I of the 1945 Missouri Constitution, Sections 14 and 29, Art. 2, Constitution of 1875, to peaceably assemble and organize for any proper purpose, to speak freely and to present their views and desires to any public officer or legislative body. Employees had these rights before Section 29, Article I, 1945 Constitution was adopted. * * * Organization by citizens is a method of the democratic way of life and most helpful to the proper functioning of our representative form of government. It should be safeguarded and encouraged as a means for citizens to discuss their problems together and to bring them to the attention of public officers and legislative bodies. Organizations are likewise helpful to bring public officers and employees together to survey their work and suggest improvements in the public service as well as in their own working conditions. Our General Assembly has even provided by statute for an organization of all trial and appellate judges of this state to consider and discuss the work of the courts and make recommendations for legislation. * * * * * Organizations of other state, county and municipal officers are well known and have long been recognized as serving a useful purpose. Nevertheless, the organization and activity in organizations of public officers and employees is subject to some regulation for the public welfare. * * * * *

" * * * However, collective bargaining by public employees is an entirely different matter. This was pointed out by such a friend of union labor as our late President, Franklin D. Roosevelt, in a letter to the head of a union of Federal employees, which was read in the debates on Section 29 in our Constitutional Convention. This letter states: 'All Government employees should realize that the process of col-

lective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employe organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employes alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.'

* * * * *

"Undoubtedly Section 29 had a different purpose. It was intended to safeguard collective bargaining as that term was usually understood in employer and employee relations in private industry. * * * The only field in which employees have ever had established collective bargaining rights, to fix the terms of their compensation, hours and working conditions, by such collective contracts, was in private industry.* *

"Under our form of government, public office or employment never has been and cannot become a matter of bargaining and contract. * * * This is true because the whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative powers. Except to the extent that all the people have themselves settled any of these matters by writing them into the Constitution, they must be determined by their chosen representatives who constitute the legislative body. It is a familiar principal of constitutional law that the legislature cannot delegate its legislative powers and any attempted delegation thereof is void. * * * Although executive and administrative officers may be vested with a certain amount of discretion and may be authorized to act or make regulations in accordance with certain fixed standards, nevertheless the matter of making such standards involves the exercise of legislative powers. Thus qualifications, tenure, compensation and working conditions of public officers and employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract. Such bargaining could only be usurpation of legislative powers by executive officers; and, of course, no legislature could bind itself or its successor to make or continue any legislative act. Therefore, this section can only be construed to apply to employees in private industry

where actual bargaining may be used from which valid contracts concerning terms and conditions of work may be made. It cannot apply to public employment where it could amount to no more than giving expression to desires for the lawmaker's consideration and guidance. For these fundamental reasons, our conclusion is that Section 29 cannot reasonably be construed as conferring any collective bargaining rights upon public officers or employees in their relations with state or municipal government."

While the factual situation in this case involved civil employees of the City of Springfield, yet the court referred to them as public employees in almost every instance, and it is our thought that the conclusion reached applies equally as well to employees of the county highway commission.

Section 70.210 RSMo 1949, defines the term political subdivision to be:

"The term 'political subdivisions' as used in sections 70.210 to 70.320 shall be construed to include counties, townships, cities, towns, villages, school, road, drainage, sewer, levee and fire districts."

From the above-quoted definition it is clear that a county is a political subdivision of the state, and it follows that employees of a county highway commission would be public employees of their county, a political subdivision of the state.

Our research further discloses that no Missouri statutes prohibit employees of a county or other political subdivision of the state from becoming members of a labor union.

In view of the foregoing, and in answer to the first inquiry of the opinion request, it is our thought that, under provisions of the Constitution and Statutes of Missouri, employees of a county highway commission are authorized to organize and become members of a labor union.

We understand the second inquiry to be whether or not the Constitution and Statutes of Missouri empower the county court to enter into collective bargaining negotiations with a labor union representing employees of the county highway commission.

Again we call attention to the case of City of Springfield v. Clouse et al., supra, as it is the only Missouri case we have been able to find in point with the questions presented in the opinion request. After holding that it was proper for public employees to organize labor unions, the court had something further to say in regard to the collective bargaining powers of public employees' unions, and also the power of public officers to enter into such negotiations under provisions of Article I, Section 29 of the Constitution, supra, as

Honorable W. H. S. O'Brien

stated above, beginning with the second paragraph of the quote on page 3.

In the case of State ex rel. Floyd v. Philpot, 364 Mo., at 735, the court held that under provisions of the new Missouri Constitution county courts were not named among the judicial courts of the state, and aside from the management of financial affairs of the county, a county court now has only those powers conferred by statute. At l.c. 744, the court said:

"County Courts are not now named among the 'constitutional courts' in which the judicial power of the state is vested (Article V, Constitution of Missouri 1945), but such courts are recognized in the Article treating with 'Local Government,' and they are given authority to 'manage all county business as prescribed by law.' Section 7, Article VI, Constitution of Missouri 1945. The authorities are uniform to the effect that, outside of the management of the fiscal affairs of the county, such courts possess no powers except those conferred by statute, Rippeto v. Thompson, 358 Mo. 721, 216 S.W.(2d) 505, 508; Bradford v. Phelps County, 357 Mo. 830, 210 S.W.(2d) 996, 999; Lancaster v. Atchison County, 352 Mo. 1039, 180 S.W.(2d) 706, 708; State ex rel. Walther v. Johnson, 351 Mo. 293, 173 S.W.(2d) 411, 413."

Chapter 49, RSMo 1949, is in regard to county courts and county buildings, and it appears that the general powers of the county court, including that of entering into and becoming a party to various classes of contracts on behalf of the county, are set forth. It is noted that none of such statutory provisions provide that a county court may enter into collective bargaining negotiations, or may enter into contracts of employment with a labor union representing county employees. In the absence of any statutory provisions authorizing it to do so, a county court does not have the power and cannot enter into negotiations with a labor union, or enter into contracts of employment with representatives of such unions. In this connection, we call attention again to the case of City of Springfield v. Clouse et al., supra, in which the court held that Article I, Section 29, of the Constitution had no reference to public officers and employees, but applied only to employers and employees in private industry. The court further stated that collective bargaining was for the purpose of reaching agreements resulting in binding contracts between unions representing employees and their employers, and the only field in which collective bargaining rights of employees to fix the terms of their compensation, hours, and working conditions by such contracts was in private industry.

Honorable W. H. S. O'Brien

Therefore, in view of the foregoing, and in answer to the second inquiry, it is our thought that under the provisions of the Constitution and Statutes of Missouri, a county court lacks the power and cannot enter into collective bargaining negotiations with a labor union representing employees of the county highway commission.

The third inquiry asks whether provisions of the Constitution and Statutes of Missouri empower the county court to enter into and execute a contract of employment with a labor union representing employees of the county highway commission. For the reasons given in our discussion of the second inquiry, and in answer to the third inquiry, it is believed that under provisions of the Constitution and Statutes of Missouri, the county court lacks the power and cannot enter into and execute a contract of employment with a labor union representing employees of the county highway commission.

CONCLUSION

Therefore, it is the opinion of this department that under provisions of the Missouri Constitution of 1945, and Revised Statutes of Missouri for 1949: (1) Employees of a county highway commission may legally organize and become members of a labor union; (2) a county court lacks the power to enter into collective bargaining with a labor union representing employees of a county highway commission; (3) a county court lacks the power to enter into and execute a contract of employment with a labor union representing employees of a county highway commission.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

PNC/ld

CORONER'S INQUEST: Each juror attending a coroner's in-
JURORS: quest shall receive the sum of \$3.00
per day.



March 20, 1957

Honorable W. H. S. O'Brien
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"RE: Official Opinion Interpret-
ing Section 494.170 R.S.M.1949,
'Fees of Jurors'

"I have been asked by the Coroner
of Jefferson County to request an
official opinion from your office
concerning the above captioned
statute.

"By way of explanation may I first
state that quite frequently when
death occurs late at night and the
circumstances cause the office of
the Coroner to take action, a coro-
ner's jury is summoned and they then
view the body in the condition in
which it has been found. Thereafter,
depending upon the circumstances the
coroner either requests an autopsy
be made or permits the body to be em-
balmed and prepared for burial. In
these instances the jury is then ex-
cused and directed to report back at
whatever later time may be selected
for the holding of an inquest. Oc-
casionally it develops at the inquest
that additional investigation is re-
quired, in which case the jury would
again be excused and directed to ap-
pear at a later date for the continu-

Honorable W. H. S. O'Brien

ance of the inquest.

"It has been the practice that the jury would be sworn immediately before their viewing of the body.

"My request is as follows:

"1. In the event that a coroner's jury is called and sworn for the purpose of viewing a body, and is later recalled to complete the inquest, how much should be paid to each juror for such service?

"3. In the event that in addition to services as described above a jury should be recalled on a later date for additional testimony, how much additional, if any, should each juror be paid?"

Section 494.170, RSMo 1949, was amended by House Bill No. 206 which was enacted by the 68th General Assembly and which reads as follows:

"1. Except as otherwise provided by law jurors shall be allowed fees for their services as follows:

"(1) For each juror attending a view or execution of a writ of ad quod damnum, per day \$1.00

"(2) For each juror attending a coroner's inquest per day 3.00

"(3) For each person summoned, attending and reporting to any court of record, per day 1.00

"(4) For each mile traveled in going to and returning from the place of the trial in attending any trial before a court of record, per mile07

Honorable W. H. S. O'Brien

"2. All fees allowed jurors as above shall be taxed as costs in the cases, respectively, in which they were summoned; but jurors serving in more than one case on the same day, at the same place, shall be allowed fees only in one case; and any juror, who claims fees for attending in two or more cases, on the same day, at the same place, shall not be allowed fees for that day."

Your first question reads:

"In the event that a coroner's jury is called and sworn for the purpose of viewing a body, and is later recalled to complete the inquest, how much should be paid to each juror for such service?"

We are not sure whether by the term "and is later recalled to complete the inquest" you mean recalled the same day that the first part of the inquest was held, or on some other and later day. From the language of the section quoted above, it would seem clear that if the jury is recalled to complete the inquest the same day that the first part of the inquest was held that each juror would receive only the sum of \$3.00 as is provided by Section 494.170. If recalled at a later and another day we believe that the sum which they receive would be \$3.00.

Your second question is:

"In the event that in addition to services as described above a jury should be recalled on a later date for additional testimony, how much additional, if any, should each juror be paid?"

We are not completely clear as to your meaning on this but our construction of it is that you mean that the jury would be reassembled at a later date to further serve in the capacity as a coroner's jury. In this event, according to the language of the section quoted above, each juror would receive the sum of \$3.00 per day.

Honorable W. M. S. O'Brien

CONCLUSION

It is the opinion of this department that each juror attending a coroner's inquest shall receive the sum of \$3.00 per day.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

DEAD HUMAN BODIES:
STATE ANATOMICAL BOARD:
DISPOSITION OF:

A dead human body, which is not required to be buried at public expense, does not come within the jurisdiction of the Missouri State Anatomical Board.



July 17, 1957

M. D. Overholser, M. D.
Secretary
Missouri State Anatomical Board
Medical Center
Department of Anatomy
University of Missouri
Columbia, Missouri

Dear Dr. Overholser:

Your recent request for an official opinion reads:

"May we have your opinion concerning the legality of the delivery of a dead human body from this state to a medical school in another state at the direction of the next of kin.

"The particular circumstances involved are as follows: A body in the custody of a funeral director in Missouri was transported to the Department of Anatomy of a medical school in another state with the information that the body had been released to that institution by the wife and stepson of the deceased. The Secretary of the particular Local Anatomical Board and the particular Registrar of Vital Statistics in Missouri ruled that the body could not be transported across the State line. This ruling was based on their interpretations of the Anatomical Law sections 3 and 4 and the Revised (1956) Probate Code: Section 261. The body in question was subsequently returned to Missouri.

"The chairman of the Department of Anatomy in the other state felt that this was not a case of an unclaimed body (and therefore under the jurisdiction of the Anatomical Board) being transported out of the State, but rather a case of the family directing the final disposition of the remains to a medical school in another state. He has requested a clarification of the interpretation of the laws involved.

M. D. Overholser, M. D.

"Certainly if this were the wish of the deceased as expressed in a will there would be no doubt as to the legality of the disposition of the body in another state, but our question is concerned with the right of the next of kin when direction for final disposition had not been expressed in a will of the deceased."

In regard to the above, we note your reference to Section 261 of the Missouri Probate Code and your statement that the ruling of the Anatomical Board was in part based upon this section. Section 261 of the Probate Code is now Section 474.310, V.A.M.S. Missouri Cumulative Supplement, 1955, and reads:

"Any person of sound mind, eighteen years of age or older may by last will devise his real or personal property and may also devise the whole or any part of his body to any college, university, licensed hospital or to the state anatomical board for use in the manner expressly provided by his will or otherwise."

Inasmuch as you state that the deceased in the instant case did not make a will, the above section could not possibly have any bearing upon the situation.

We next direct your attention to numbered paragraphs 1 and 2 of Section 194.120, RSMo 1949, which paragraphs read:

"1. That the heads of departments of anatomy, professors and associate professors of anatomy at the educational institutions of the state of Missouri which are now or may hereafter become incorporated, and in which said educational institutions human anatomy is investigated or taught to students in attendance at said educational institutions, shall be and hereby are constituted the Missouri State Anatomical Board, herein referred to in Sections 194.120 to 194.180 as 'the board.'

"2. The board shall have exclusive charge and control of the disposal and delivery of dead human bodies, as described in sections 194.120 to 194.180, to and among such educational institutions as under the provisions of said sections are entitled thereto."

We next direct your attention to numbered paragraph 1 of Section 194.150, which reads:

M. D. Overholser, M. D.

"1. Superintendents or wardens of penitentiaries, houses of correction and bridewells, hospitals, insane asylums and poor houses, and coroners, sheriffs, jailers, city and county undertakers, and all other state, county, town or city officers having the custody of the body of any deceased person required to be buried at public expense, shall be and hereby are required immediately to notify the secretary of the board, or the person duly designated by the board or by its secretary to receive such notice, whenever any such body or bodies come into his or their custody, charge or control, and shall, without fee or reward, deliver, within a period not to exceed thirty-six hours after death, except in cases within the jurisdiction of a coroner where retention for a longer time may be necessary, such body or bodies into the custody of the board and permit the board or its agent or agents to take and remove all such bodies, or otherwise dispose of them; provided, that each educational institution receiving a body from the board shall hold such body for at least thirty days, during which time any relative or friend of any such deceased person or persons shall have the right to take and receive the dead body from the possession of any person in whose charge or custody it may be found, for the purpose of interment, upon paying the expense of such interment."

(Underscoring ours.)

The above sets out the situations in which the State Anatomical Board has a right to receive dead human bodies. The first underlined portion limits the class of bodies to those "required to be buried at public expense." That is not the situation here since the body is not to be required to be buried at public expense, and thus, the instant case is automatically removed from the compass of Section 194.150, supra.

It would appear without further discussion that the body in the instant situation does not come within that class of bodies to which the State Anatomical Board has any claim whatsoever.

In view of the fact that we have held that in the instant situation the State Anatomical Board has no scintilla of right

M. D. Overholser, M. D.

to or interest in the particular dead body in question, it would appear that what right of disposition of the body the wife of the deceased had in regard to its disposition was not a matter of any official concern of the State Anatomical Board.

CONCLUSION

It is the opinion of this department that a dead human body which is not required to be buried at public expense does not come within the jurisdiction of the Missouri State Anatomical Board.

The foregoing opinion, which is hereby approved, was prepared by Assistant Attorney General Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

By

Robert R. Welborn
Assistant Attorney General

HPW/b1

ASSESSORS: In the case of part time deputy county assessors, a
DEPUTY ASSESSORS: portion of whose salary is paid out of the county
treasury and a portion by the assessor personally,
are county employees and that the county is liable
for social security contributions to the extent of
the amount of salary which it pays to them; the county is not liable
for contributions for unemployment compensation for deputy assessors;
and part time deputy assessors would not, to the extent that their
salaries are paid by the county, automatically come within the pro-
visions of the Workmen's Compensation Act.



August 27, 1957

Honorable W. H. S. O'Brien
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I have been asked by Mr. Oscar 'Bud' Kasten, Assessor of Jefferson County to request an opinion from your office concerning the following inquiries:

1. Various individuals are hired on a part time basis for the purpose of taking personal property tax assessment listings; and for this they are paid a fixed amount per list, are not paid a set salary and are employed on part time basis. Query: should these individuals be construed as employees of the County or employees of the assessor personally, for the purpose of federal social security payment?
2. Would the fact that four or more of these individuals are employed as above described cause either the assessor or the County Court to be liable for contribution for unemployment compensation?
3. If such an individual as above described were to be involved in an automobile collision causing personal injury to another person or causing personal injury resulting in death to another person, would the so-called 'deputy assessor' be protected by the immunity that is inherent to the sovereign state? Further query: Would the assessor be liable under the doctrine of 'respondeat superior'?

Honorable W. H. S. O'Brien

4. Assuming that an assessor of a 3rd class county such as Jefferson County were to have a total number of employees, both clerical, stenographic and as deputy assessors, to satisfy the numerical requirement under the provisions of the Workman's Compensation Act referring to major employers, would such an assessor be automatically under Workman's Compensation?

5. I would further be interested in any comments your office may have in the above areas of consideration as they would apply to other public officers of the County.

"If the above inquiries are not clear to the member of your staff to whom this request is directed, please ask for clarification before attempting to render an official opinion."

In answer to your first question, we enclose a copy of an opinion rendered by this department on October 26, 1951, to Phillip A. Grimes, Prosecuting Attorney of Boone County, which opinion holds that such employees as you mention are county employees and that the county is liable for social security contributions to the extent, and upon the basis, of the amount paid by the county to such employees.

In regard to your second question, we will state that we do not believe that a county employee would come within the compass of the Employment Security Law. Subparagraph 6 of paragraph 16 of Section 288.030, Cum. Supp. 1955, reads:

"(6) The term 'employment' shall not include:"

This is followed by subparagraph (e) which reads:

"(e) Service performed in the employ of this state or of any political subdivision thereof or of any instrumentality of this state or its political subdivisions:"

This would include deputy assessors, since they are, to a limited extent, employees of the county, and since a county is a political subdivision of the state, such deputy assessors, therefore, do not come within the compass of the state employment security law, so far as the county is concerned. Regarding personal liability of the assessor we will not give an opinion since that is a matter involving only a private individual.

In regard to question numbered three, as to any liability on the part of the assessor personally, or of the deputy assessor

Honorable W. H. S. O'Brien

personally, we do not give an opinion, since this is a matter personal to them.

Your final question relates to employees of the assessor automatically coming under the provisions of the Workmen's Compensation Act.

Section 287.030 reads:

"The word 'employer' as used in this chapter shall be construed to mean:

(1) Every person, partnership, association, corporation, trustee, receiver, the legal representatives of a deceased employer, and every other person, including any person or corporation operating a railroad and any public service corporation, using the service of another for pay;

(2) The state, county, municipal corporation, township, school or road, drainage, swamp and levee districts, or school boards, board of education, regents, curators, managers or control commission, board or any other political subdivision, corporation, or quasi corporation, or cities under special charter, or under the commission form of government, which elects to accept this chapter by law or ordinance.

(3) Any reference to the employer shall also include his insurer."

From the above, it will be seen that a county and county employees are not "automatically" under the provisions of the Workmen's Compensation Act so far as salary paid to them by the county is concerned, but that to come within it, positive action must be taken by the county court.

We note the general invitation contained in your Number 5. We hesitate to make this attempt because you do not indicate, with sufficient definiteness, the information which you desire.

CONCLUSION

It is the opinion of this department that in the case of part time deputy county assessors, a portion of whose salary is paid out of the county treasury and a portion by the assessor personally, are county employees and that the county is liable for social security contributions to the extent of the amount

Honorable W. H. S. O'Brien

of salary which it pays to them; the county is not liable for contributions for unemployment compensation for deputy assessors; and part time deputy assessors would not, to the extent that their salaries are paid by the county, automatically come within the provisions of the Workmen's Compensation Act.

The foregoing opinion, which is hereby approved, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW/ld/b1

Enc.

CRIPPLED CHILDREN:
CRIPPLED CHILDREN'S
HOSPITAL:



A female person under the age of 21 years, who comes within the compass of Chapter 201, RSMo 1949, and who is eligible to receive hospitalization and medical treatment at the University of Missouri under the provisions of the aforesaid chapter, does not lose this eligibility by marriage, provided that her husband is unable to pay the expenses of said hospitalization and medical treatment.

April 8, 1957

Honorable Paul M. Peterson
General Counsel
University of Missouri
1 Tate Hall
Columbia, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I have been requested by The curators of the University of Missouri to obtain from your office a ruling upon the following questions relating to their duties as provided by Chapter 201 RSMo 1949.

"A minor girl is ordered to a hospital for treatment under the provisions of Sec. 201.030 RSMo 1949. Thereafter, and before attaining the age of twenty-one the girl marries. Her physical condition at the time of marriage is such that her treatment at the hospital would be continued.

"First, may The Curators of the University of Missouri under such circumstances continue to provide treatment for the minor and be reimbursed for the expense thereof under Sec. 201.090?

"Second, if your ruling is that treatment for the minor wife may not be continued, may the minor wife, upon application of the husband, be again ordered for treatment under the provisions of Sec. 201.030?

Honorable Paul M. Peterson

As you point out, Chapter 201, RSMo 1949, relates to the "Crippled Children's Hospital" located in Columbia, Missouri.

Section 201.010 of that chapter makes provision for the examination and filing of a report in a county regarding a child who is in need of medical treatment. This section states "that the child named therein is under twenty-one years of age." We here note that in 1943 this age limit was raised from fifteen to twenty-one years.

Section 201.020 reads:

"All children, under twenty-one years of age, suffering from rheumatic heart disease which can probably be remedied by surgical or medical care, shall be eligible to receive free surgical and medical treatment and hospital care in the same manner, to the same extent and subject to all of the conditions and provisions relating to the care of children suffering from a deformation or malady as a result of such deformation, as otherwise provided in this chapter."

Numbered paragraph 1 of Section 201.030 reads:

"Upon the filing of such report or reports the court shall fix a day for the hearing upon the information and shall cause the parent or parents, guardian or other person having legal custody of said child to be notified of the hearing, and upon the hearing of such information evidence may be introduced. And if the court finds that the said child is suffering from a deformation or malady as a result of such deformation which can probably be remedied by surgical or medical treatment and hospital care, and the parent or parents, guardian or other person legally chargeable with the support is unable to pay the expenses thereof, the court, with the consent of the parent or parents, guardian or other person having the legal custody

Honorable Paul M. Peterson

of such child shall order such child taken or sent to the hospital of the state University of Missouri, or any other hospital in this state which shall be approved by the board of curators of the University of Missouri as herein-provided, for free surgical and medical treatment, and hospital care."

It is this latter section which you have asked us to construe.

In the situation which you present to us, it is assumed that the crippled child comes within the purview of Chapter 201; that the individual is under twenty-one years of age; and that such individual would, but for the circumstance of becoming married, be eligible for continued treatment under the provisions of this aforesaid chapter. However, while receiving this treatment, and before reaching the age of twenty-one, and while still in need of receiving such treatment, the "child," who you state is a girl, becomes married. The question is what effect the marriage has, if any, upon the status of this girl as to a continuation of care according to the provisions of Chapter 201.

In order to hold that a person otherwise eligible for these benefits, and a person who was receiving them, automatically became ineligible upon marriage, we must point to a law which plainly holds this to be the case, and this we are unable to do.

As we pointed out above, Section 201.010 of the chapter defines the word "child" as a person under twenty-one years of age. There is no law or case which holds that the mere act of marriage would change a "child," defined according to the above section as being a person under twenty-one years of age, into an adult.

Chapter 201 confers upon all persons who come within its purview certain rights and privileges, to wit, the right to receive hospitalization and medical care at the University Hospital. Before such right and privilege can be taken away from such individual the reason for so doing must be clearly stated and this, in the instant situation, we cannot do. We must therefore conclude that marriage, provided, of course, that the husband is unable to pay the expenses of hospitalization and medical treatment, does

Honorable Paul M. Peterson

not make a girl under the age of twenty-one years ineligible to receive continued hospitalization and medical treatment.

CONCLUSION

It is the opinion of this department that a female person under the age of twenty-one years, who comes within the compass of Chapter 201, RSMo 1949, and who is eligible to receive hospitalization and medical treatment at the University of Missouri under the provisions of the aforesaid chapter, does not lose this eligibility by marriage, provided that her husband is unable to pay the expenses of said hospitalization and medical treatment.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

UNIVERSITY OF MISSOURI:
BOARD OF CURATORS:
CURATORS OF MISSOURI UNIVERSITY:
STATE EMPLOYEES:
UNIVERSITY EMPLOYEES:
STATE EMPLOYEES' RETIREMENT
SYSTEM:

Under the Missouri State Employees' Retirement System Law the Board of Curators of the University of Missouri is not required to make "matching" contributions to the Retirement Fund from the funds of the University.



December 12, 1957

Mr. Paul Peterson
University Attorney
1 Tate Hall
Columbia, Missouri

Dear Mr. Peterson:

You have recently requested an opinion from this office concerning the following matter:

"Under the Missouri State Employees' Retirement System Law is the University required to make 'matching' contributions from its funds to the State Employees' Retirement Fund?"

The law creating the Missouri State Employees' Retirement System was enacted as House Bill No. 188 by the 69th General Assembly. It appears in Section 104.310 to 104.550, inclusive, in the August 1957 Supplement to Vernon's Annotated Missouri Statutes.

This law provides for contributions to be deducted from the pay of the employee and for contributions to be made by appropriation by the General Assembly. The law does not call for any other contributions to the retirement fund, and there is no provision in the law under which the University is required or allowed to make contributions from its funds to the Retirement System Fund.

Section 104.360 provides for the contributions to be made by deductions from the employees' pay and Section 104.370 provides for the legislative appropriation of the state's contribution to the Retirement Fund.

There is no provision for and, therefore, the University is not required to make any so-called "matching" contribution

Mr. Paul Peterson

from its funds. Such "matching" contribution is made by appropriation by the legislature as indicated above.

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that under the Missouri State Employees' Retirement System Law the Board of Curators of the University of Missouri is not required to make "matching" contributions to the Retirement Fund from the funds of the University.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:vlw:hw

SCHOOLS:



In computing the equalization quota the district in which a pupil resides is entitled to count, for resident attendance, all resident children attending another public school whose tuition the district is required to pay, but that the district is not allowed to count, for resident attendance, a resident pupil attending another public school whose tuition the student himself is paying.

June 6, 1957

Honorable W. H. Pinnell
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I would like an opinion from your office with respect to whether the apportionment per student in each district which the state pays to the school district in which the student resides is payable in those cases where the particular student involved elects to go to school in another district and pays tuition in that district. In other words, would the apportionment per student still be paid to the home district in which the student resides, despite the fact that the student may not be attending school in that district."

Section 161.031, Missouri Revised Statutes, Cumulative Supplement 1955, reads in part as follows:

"1. School districts which meet the requirements of section 161.025 shall receive an equalization quota computed as follows: The average daily attendance of pupils residing in the district for the preceding school year shall be multiplied by one hundred ten dollars. From this product there shall be deducted the amount derived from a tax of one dollar for school purposes on each one hundred dollars of the computed assessed valuation of the property the preceding year in the district together with the amount received during the preceding year from county and township school funds and the sum

Honorable W. H. Pinnell

received for school purposes from the railroad, telegraph, utility, intangible and all other taxes based on assessments distributed by the state tax commission. The difference thus obtained shall constitute the equalization quota for the district. In computing the equalization quota the district is entitled to count for resident attendance all resident children attending another public school and whose tuition the district is required to pay.* * *

It will be noted from the underlined portion of the above that the district is entitled to count as being of resident attendance all resident children attending another school whose tuition the district is required to pay. By inference, we deduce that in those instances, such as yours, where the district does not pay the tuition but where the tuition is paid by the pupil himself, that the district would not be entitled to count such pupil for resident attendance.

CONCLUSION

It is the opinion of this department that in computing the equalization quota the district in which a pupil resides is entitled to count, for resident attendance, all resident children attending another public school whose tuition the district is required to pay, but that the district is not allowed to count, for resident attendance, a resident pupil attending another public school whose tuition the student himself is paying.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Sincerely yours,

John M. Dalton
Attorney General

HPW:lc:ld

SCHOOLS:
EX POST FACTO LAWS:
CRIMINAL LAW:
CONSTITUTIONAL LAW :

Senate Bill No. 16 of the 69th General Assembly, which amends the compulsory attendance law, is not ~~ex~~post facto and is applicable to those children who may have graduated from the eighth grade prior to August 29, 1957, but were under sixteen years of age at that date.



November 4, 1957

Honorable W. H. Pinnell
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Mr. Pinnell:

This is in response to your request for opinion dated September 23, 1957, which reads as follows:

"Will you please advise me as to whether the new Compulsory Attendance Law, passed by the last session of the Legislature, applies to those students who have met the requirements specified under the previous Compulsory Attendance Law.

"That is, may those students who have graduated from the eighth grade in April, May, or June, of 1957, be compelled to continue to attend school until they reach the age of sixteen years or by attending school through the eighth grade, as of April, May, or June, of 1957? Have they met the requirements of the law; and, therefore, the new and what is apparently additional requirements cannot be applied to them on the theory that the new law is a retroactive one as far as one applying to them is a new law and therefore cannot affect them?

"It would appear to me that there might be some question about the enforceability of the law with respect to those students who have met requirements of the law as of the date of their graduation in April, May, or June, of 1957."

Honorable W. H. Pinnell

The new compulsory attendance law, to which you refer, is Senate Bill No. 16 of the 69th General Assembly which became effective on August 29, 1957. That bill, which amends Section 164.010, RSMo, reads as follows:

"Section 1. Section 164.010, RSMo 1949, is repealed and one new section enacted in lieu thereof, to be known as section 164.010, to read as follows:

"164.010. Every parent, guardian or other person in this state having charge, control or custody of a child between the ages of seven and sixteen years shall cause the child to attend regularly some day school, public, private, parochial or parish, not less than the entire time the school which the child attends is in session or shall provide the child at home with regular daily instructions during the usual school hours which shall, in the judgment of a court of competent jurisdiction, be at least substantially equivalent to the instruction given children of like age in the day schools in the locality in which the child resides; except that

(1) A child who, to the satisfaction of the superintendent of schools of the district in which he resides or another person authorized to act for him, is determined to be mentally or physically incapacitated may be excused from attendance at school for the full time required, or any part thereof; or

(2) A child between fourteen and sixteen years of age may be excused from attendance at school for the full time required, or any part thereof, by the superintendent of schools or other person authorized to act for him or by a court of competent jurisdiction when legal employment has been obtained by the child and found to be desirable, and after the parents or guardian of the child have been advised of the pending action."

Honorable W. H. Pinnell

Prior to the enactment of Senate Bill No. 16, supra, Section 164.010, RSMo, provided that a child between the ages of fourteen and sixteen might be excused temporarily from complying with the terms of that section if it be shown to the satisfaction of the attendance officer or a court of competent jurisdiction that such child had completed the common school course or its equivalent and had received a certificate of graduation therefrom.

In determining whether Senate Bill No. 16 is applicable to those children who had completed the common school course prior to the effective date thereof but who had not as yet reached the age of sixteen years, it must be borne in mind that proceedings for violation of the requirements of the compulsory attendance law are not against the child but against the parent, guardian or other person having charge, control or custody of such child. Under Section 164.060, RSMo 1949, the parent, guardian or other person having charge, control or custody of a child and who violates the attendance law is guilty of a misdemeanor.

Section 13 of Article I of the Constitution of Missouri, 1945, provides:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

The distinction between ex post facto and retrospective laws was drawn in State ex rel. Jones v. Nolte, 350 Mo. 271, 165 SW2d 632, 1.c. 638:

" * * * As used in both the State and Federal Constitutions the term ex post facto law applies only to criminal legislation; that is, to laws which denounce as crimes acts which were innocent when committed or which change the penalties to be imposed for criminal violations after the date of the violation. The term retrospective law, however, in the State Constitution has a wider significance and the provision last cited is closely analogous to the obligation of contracts clause of §10, Art. I of the Constitution of the United States. Both of these provisions apply to laws which take away the vested rights of individuals

Honorable W. H. Pinnell

after those rights have been acquired.
McManus v. Park, 287 Mo. 109, 229 S.W. 211;
Gibson v. Chicago, Great Western R. Co.,
225 Mo. 473, 125 S.W. 453; Clark v. Kansas
City, St. L. & C. R. Co., 219 Mo. 524, 118
S.W. 40. * * *

Since the enforcement of the compulsory attendance law is by criminal process, Senate Bill No. 16 must be measured by the standards prescribed for determining whether a law is *ex post facto*.

Does Senate Bill No. 16 purport to denounce as a crime any act innocent when committed? Clearly it does not, but is prospective only in its operation. Merely because a person may have acquired a legal status under the existing law he has no vested right to continue that status if the law is changed making that same status illegal in the future.

An analogical situation is found in *Samuels v. McCurdy*, 45 S. Ct. 264, 267 U.S. 188, 69 L. Ed. 568, 37 L.R.A. 1378. There, the State of Georgia had enacted a statute prohibiting the possession of intoxicating beverages and provided for seizure and destruction thereof. The plaintiff had lawfully acquired certain liquors prior to the effective date of the law, but they were seized by the sheriff of the county. This was an action to recover the possession of the liquors. Among other contentions, it was alleged that the law under which liquor lawfully acquired could be seized and destroyed was an *ex post facto* law. The court, in disposing of this contention, said at U.S. l.c. 193:

"This law is not an ex post facto law. It does not provide a punishment for a past offense. It does not fix a penalty for the owner for having become possessed of the liquor. The penalty it imposes is for continuing to possess the liquor after the enactment of the law. It is quite the same question as that presented in Chicago & Alton R.R. Co. v. Tranbarger, 238 U.S. 67. There a Missouri statute required railroads to construct water-outlets across their rights of way. The railroad company had constructed a solid embankment twelve years before the passage of the Act. The railroad was penalized for non-compliance with the statute. This Court said:

Honorable W. H. Pinnell

'The argument that in respect to its penalty feature the statute is invalid as an ex post facto law is sufficiently answered by pointing out that plaintiff in error is subjected to a penalty not because of the manner in which it originally constructed its railroad embankment, nor for anything else done or omitted before the passage of the act in 1907, but because after that time it maintained the embankment in a manner prohibited by that act.'

Just as in the Samuels case it was the continued possession of the liquor after the effective date of the law prohibiting its possession which was the punishable offense, so in this case it is the failure of a parent, guardian, etc., to send a child to school after the effective date of Senate Bill No. 16 which is denounced as a crime.

CONCLUSION

Therefore, it is the opinion of this office that since Senate Bill No. 16 operates prospectively only, it is not ex post facto and is applicable to the parents, guardians or other persons having charge, custody or control of children who may have graduated from the eighth grade prior to August 29, 1957, but who had not on that date reached the age of sixteen years.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

BOARD OF TRUSTEES OF
COUNTY HOSPITALS:
COUNTY COURTS:
CONVEYANCE OF COUNTY
HOSPITAL PROPERTY:

A board of county hospital trustees may not convey title to hospital property, title to which property is in the county; and further, that the county court of the county may convey title to such property when authorized to do so by the Board of Trustees of the County Hospital.

July 11, 1957



Honorable Charles A. Powell, Jr.
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Mr. Powell:

Your recent request for an official opinion reads:

"The County Court of this county has asked for an opinion respecting the inquiries put to them and me in the letter enclosed.

"The County Board of Health Center Trustees in our county has acquired quite a surplus of money and are desirous of spending some for the purchase of a portion of the hospital grounds (title to which is in the County of Macon) and erection of appropriate buildings.

"The questions put in the 5th and 6th paragraphs of the letter enclosed are the ones that the hospital board of trustees are desirous of having answered."

As being explanatory of your request and referred to in it is the letter of Paul D. Hess, Jr., member of the Board of Trustees of the Macon County Hospital addressed to the Judges of the Macon County Court, which reads:

"At the last meeting of our board of trustees of the Macon County Hospital, known as the Samaritan Hospital, it was directed that the following matter be referred to you for consideration and opinion.

"Attention is invited to the provisions of Paragraph 4 of Section No. 205.190, R.S.Mo.

Honorable Charles A. Powell, Jr.

1949, where in part it is provided that: The Board of hospital trustees 'shall have exclusive control * * * of the purchase of site * * * and of the supervision, care and custody of the grounds * * * purchased, constructed, leased or set apart for that purpose.' Nowhere among the statutory provisions concerning County Hospitals is it noted that express authority is set forth concerning the sale of any such properties.

"Attention also is invited to Paragraph 4 and 9 of Section 205.042, R.S.No. 1949, concerning County Health Centers, trustees for such a center having been selected and serving in Macon County for the last few years.

"It will be recalled that the land, upon which the Samaritan Hospital Building and improvements are located, was deeded to the County of Macon, Missouri, upon its purchase of such properties from the corporation which owned them before the hospital became a County Hospital.

"Recently the Board of Health Center Trustees contacted the Trustees of the County Hospital Board and inquired whether a portion of the hospital grounds could and would be sold and conveyed to the Health Center Board for the purpose of erecting health center buildings and improvements. At this time there are no specific plans concerning size or cost of any such health center improvements as it is unknown whether any such conveyance would be approved by the hospital board trustees, which board believes it essential that it be ascertained whether such conveyance legally could be made before such board as a matter of policy determines whether it would favor any such conveyance. Of course it is also unknown, as the land involved was conveyed to, and taken in the name of, the County of Macon, whether any such conveyance would be made by the hospital board trustees or the Macon County Court, or by both such groups acting concurrently.

"Please inform the Hospital Board of Trustees (1) whether the Macon County Hospital

Honorable Charles A. Powell, Jr.

Board of Trustees has power to convey any of the hospital real estate to the Board of Health Center Trustees; and, if the answer to the last question be negative, (2), whether the Macon County Hospital Board of Trustees, acting concurrently with the Macon County Court, has power to convey any of the hospital real estate to the Board of Health Center Trustees.

"Accordingly, it is requested that the Macon County Court consider these matters and also refer such, for an expression of his official opinion, to Prosecuting Attorney Powell."

Your first question is whether the Macon County Hospital Board of Trustees has the power to convey any of the hospital real estate to the Macon Board of Health Center Trustees.

As you point out in your letter, paragraph 4 of Section 205.190, RSMo 1949, does not vest in the Board of Hospital Trustees any power of conveyance of hospital property. Neither do we find elsewhere in the statutes any such power, nor do we find any case which so holds. In addition to this is the fact that in the instant situation it seems obvious that such a conveyance could not be made by the county hospital board because, as stated in the Hess letter, "the land involved was conveyed to and taken in the name of the County of Macon * * *." Manifestly, the board of hospital trustees could not convey title to land to which they, as a board, do not have.

Therefore, the answer to your first question is in the negative.

Your second question is whether the Macon County Hospital Board of Trustees, acting concurrently with the Macon County Court, has power to convey any of the hospital real estate to the Board of Health Center Trustees. We believe that the answer to this question is in the affirmative. Section 49.270, RSMo 1949, reads:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Honorable Charles A. Powell, Jr.

It will be seen that the county court is vested with the power to sell and convey any real estate belonging to the county. We have previously noted that title to this particular real estate is vested in the county. Inasmuch as we are unable to see that any title or property right in this property is vested in the Board of Hospital Trustees, we do not believe that the meaning which should be given to your words "acting concurrently" is that the Board of Hospital Trustees should, together with the county court, sign a deed of conveyance. However, we do believe that such is their situation that their consent to such conveyance must first be obtained. Numbered paragraph 4 of Section 205.190, RSMo 1949, reads:

"4. The board of hospital trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, not inconsistent with sections 205.160 to 205.340 and the ordinances of the city or town wherein such public hospital is located. They shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, and of the purchase of site or sites, the purchase or construction of any hospital buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose; provided, that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of the hospital fund, and paid out only upon warrants ordered drawn by the county court of said county upon the properly authenticated vouchers of the hospital board."

From the above, it will be seen that complete care and custody of the county hospital is vested in the Board of Trustees. Since this is true, we do not believe that a county court could convey a hospital away from the Hospital Board of Trustees at will. In the case of *State v. Trimble*, 293 S.W. 98, the Missouri Supreme Court, en banc, was considering a situation in which vouchers for the payment of money were drawn upon the hospital fund held by the county. The county refused to honor these vouchers and the suit followed. In the course of its opinion, the court set forth its interpretation of the relationship between the hospital board and the county. At l.c. 100, the court said:

Honorable Charles A. Powell, Jr.

"The Court of Appeals held squarely that the function of the county court in respect to the claims was purely ministerial, that it had no duty to perform and no discretion in determining whether the claims were proper or whether the contracts out of which they arose were in accordance with the statute."

At l.c. 101, the court held further:

"The Court of appeals construed these statutes to mean that hospital trustees have exclusive control of the expenditure of moneys collected to the credit of the hospital fund. The natural interpretation of that language excludes the intervention of any other official in determining what claims are to be paid and what accounts ought to be allowed. The plain words mean that full discretion is vested in the hospital board to pass upon and determine the validity of every claim presented. Relators call attention to the provision that the money must be deposited in the treasury of the county and must be paid out only upon warrants drawn by the county court, and argue that the county court is thus vested with some discretion, some function to determine whether or not the claims presented are valid, but that same sentence of the statute goes on to say that such payments are made upon properly authenticated vouchers of the hospital board. That seems to leave no doubt that the only judgment exercised by the county court is to determine whether the vouchers presented show proper authentication of the hospital board, and whether they are for purposes within control of the hospital board and for the purposes of the above statute. If such vouchers should show on their faces that they were issued for purposes foreign to the field controlled by the hospital board, the county court could deny warrants. The quotation from the Arkansas case cited by the Court of Appeals is in accordance with the ruling of this court. County of Boone v. Todd, 3 Mo. 140. * * *."

From the above, it will be seen that the holding of the court is that in this relationship of county to hospital board, the position of the county is ministerial in respect to the particular matter under consideration, i.e., the payment of

Honorable Charles A. Powell, Jr.

vouchers issued by the hospital board. We believe that what is true in this particular area would be equally true in other aspects of this relationship.

As we said above, we do not believe that the board of hospital trustees should be parties to the conveyance, but we do believe that their consent to such a conveyance should be first obtained, probably in the form of a resolution by the board.

CONCLUSION

It is the opinion of this department that a board of county hospital trustees may not convey title to hospital property, title to which property is in the county; and further, that the county court of the county may convey title to such property when authorized to do so by the Board of Trustees of the County Hospital.

The foregoing opinion, which is hereby approved, was prepared by Assistant Attorney General Hugh P. Williamson.

Yours very truly,

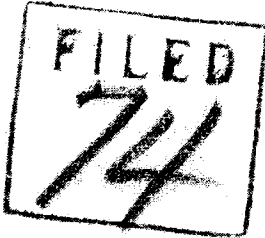
John M. Dalton
Attorney General

By

Robert R. Welborn
Assistant Attorney General

HPW/bi

JURORS: A juror not on the regular panel and summoned to sit as a
FEES: juror in any criminal case in which the offense charged is
punishable with death or by imprisonment in the penitentiary
for life or for not less than a specified number of years and
no limit to the time, whether he should have been selected on
the panel or not, is to receive the sum of \$6 per day, if he
has traveled at least one mile in attending upon the court, and
that if he has not traveled at least one mile for compensation
shall be \$1 per day.



June 19, 1957

Honorable C. Frank Reeves
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Mr. Reeves:

This is in response to your recent request for an official
opinion based upon a letter dated June 6, 1957, to you, from
Ellis W. Howlett, Clerk of the Circuit Court of Mississippi Coun-
ty, which letter reads as follows:

"I have just recently received a copy of
House Bill No. 2 which was finally passed
and signed by the Governor and becomes law
on August 29th, 1957. This is a bill chang-
ing the fees of jurors. Sections 494.100,
404.110 and 494.120, R. S. Mo. 1949 were all
repealed and new sections enacted in lieu
thereof bearing the same numbers and are
the same as in the old sections except for
the fees, the change in Sections 494.100
and 494.110 increasing the fee from \$3.00
to \$6.00 and Section 494.120 changing the
fee from \$2.00 to \$6.00.

"Section No. 494.170 page 583 of the Laws of
Missouri of 1955 has been left as is.

"The meaning of Sections 494.100 and 494.110
are clear and will cause no confusion.

"Section 404.120 and Section 494.170 have al-
ways been somewhat confusing.

"In any case where a panel of thirty qualified
jurors are required it is necessary to issue
a special venire. We always have some jurors
who have to travel at least one mile or more
and usually have a juror or two who are picked
up in town and have no mileage. Under the

Honorable C. Frank Reeves

old law the juror having mileage has been paid \$2.00 plus 5¢ per mile. Under the new law as I understand it he is to be paid \$6.00 plus 7¢ per mile. Under the old law, as I have interpreted it, the juror living in town was paid only \$1.00 as is provided by sub-section (3) of Section 494.170 Laws of Missouri page 583. This does not look fair as the man living out of town is paid mileage in addition to his per diem. Now under the new law is the man living out of town traveling more than one mile to get \$6.00 per day while the man living in town is to get only \$1.00 or am I misinterpreting the meaning of Section 494.120 and, if so, what is the use of sub-section (3) of Section 494.170 Laws of 1955. I had hoped this legislature would clarify some of these jury sections but see they have not. I would like for you to get an opinion from the Attorney General on both Sections 494.120 as recently amended and on Section 494.170 Laws of 1955. I would like to have this opinion as soon as possible as I frequently have cases requiring a panel of thirty jurors."

The request to us is for an interpretation of Section 494.120 of House Bill No. 2, enacted by the 69th General Assembly, and Section 494.170, Laws of Missouri 1955.

Section 494.120 of House Bill No. 2, which will become law on August 29, 1957, reads:

"Each juror not on the regular panel and summoned to sit as a juror in any criminal case wherein the offense charged is punishable with death, or by imprisonment in the penitentiary for life or for not less than a specified number of years and no limit to the time, whether he shall have been selected on the panel or not, if he has traveled at least one mile and attended upon the court in obedience to such summons, shall be allowed the sum of six dollars per day, for each day that he may be in attendance on the court, and seven cents per mile for each mile traveled in going to and returning from the court, whether he sits in the trial of the cause or is challenged off."

(Emphasis ours.)

Honorable C. Frank Reeves

From the above section, it seems to be clear, by the language of the section, and particularly that portion which we have underlined, that the traveling of at least one mile as well as attendance upon the court in answer to a summons, is prerequisite to being paid the sum of \$6 per day. Whether or not this was the intention of the legislature we cannot say. Nor can we indulge in speculation regarding such intention. We have to proceed upon the language which the legislature employs and follow it as nearly as possible. Numbered paragraph 3 of Section 494.170, Laws of Missouri 1955, provides that each person summoned, attending and reporting to any court of record per day, shall be paid the sum of \$1. It would appear that if a person has not traveled at least one mile in attending upon the court that he is not entitled to payment of \$6 which is provided for by Section 494.120 of House Bill No. 2, but is to be paid the sum of \$1 only under the provisions of paragraph 3, Section 494.170, Laws of Missouri 1955.

We agree with you that such a distinction seems to be unfair, but such is the language of the legislature.

CONCLUSION

It is the opinion of this department that a juror not on the regular panel and summoned to sit as a juror in any criminal case in which the offense charged is punishable with death or by imprisonment in the penitentiary for life or for not less than a specified number of years and no limit to the time, whether he should have been selected on the panel or not, is to receive the sum of \$6 per day, if he has traveled at least one mile in attending upon the court, and that if he has not traveled at least one mile, his compensation shall be \$1 per day.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW/b1

SCHOOLS:
SCHOOL FUNDS :
COUNTY TREASURER:

County treasurer should place 80% of state school moneys received by him for common school district in teachers' fund upon receipt thereof and should place remaining 20% in either incidental or teachers' fund when and as directed by school board.



June 21, 1957

Honorable C. Frank Reeves
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Mr. Reeves:

This is in response to your request for opinion dated April 29, 1957, which reads as follows:

"Missouri Revised Statute Section 161.045 provides as follows:

161.045 STATE MONEY HOW DIVIDED BETWEEN DISTRICT FUNDS

Not less than eighty percent of the state school money received under the provisions of subsections 1, 2 and 3 of section 161.031 shall be placed in the teachers' fund and the remaining percent of such moneys in the incidental fund.

"Two of the school districts have requested of the County Treasurer that the 20% of the funds referred to in above section be placed in the incidental fund.

"One of these requests ask that the funds be so divided from the beginning of the school year the other set no specific date as to when the funds were to be so divided.

"The County Treasurer needs an opinion from your office as follows:

(1) Can these funds be divided as per above section effective the beginning of the school year even though the request was made at a later date.

Honorable C. Frank Reeves

(2) Would a request that the funds be divided made after the beginning of the school year but not requesting a specific date for the division give the county treasurer authority to divide the state money from a date effective the first of the school year or a date effective from the date of the request."

Inasmuch as your questions involve the county treasurer, it follows that the school districts involved must be common school districts. Section 165.207, RSMo 1949, provides that the government and control of a common school district shall be vested in a board of directors composed of three members. This government and control includes the handling of the finances of the district. Consolidated School Dist. No. 6 vs. Shawhan, Mo. App., 273 SW 182.

Orally, you have informed us that one of the reasons for your opinion request is the fact that the county treasurer had been advised that all state school moneys should be placed in the teachers' fund when received. This advice must have been occasioned by the provisions of Section 165.110(3), RSMo, Cum. Supp. 1955. However, that section has been superseded by Section 161.045, RSMo, Cum. Supp. 1955, which was enacted by the 68th General Assembly in 1955, and which you have quoted in your request.

Because the board has control of the finances of the district, Section 161.045, supra, obviously vests discretion in the board to direct what portion of the 20% of the state moneys received by the district shall be placed in the incidental fund and what portion shall be placed in the teachers' fund. The board has no discretion in regard to 80% of such moneys. Consequently, upon receipt thereof the county treasurer may place the 80% in the teachers' fund immediately. However, he cannot know into which fund he should place the remaining 20% until he receives an order from the board directing him as to how he should apportion it.

If, at the close of the school year, the board has not instructed the county treasurer as to the manner in which it wishes the 20% of state moneys to be apportioned, since not less than the 80% must be placed in the teachers' fund, the county treasurer should place the 20%, i.e., "the remaining per cent of such moneys," in the incidental fund.

Honorable C. Frank Reeves

We are unable to see why the effective date of the division of the funds makes any particular difference. There is no requirement in Section 161.045, supra, or elsewhere, that the division and placement of state moneys be made at any particular time. Possibly, the question might arise where warrants were issued in excess of the amount available in either the teachers' fund or the incidental fund prior to a division of the 20% of state moneys already received or anticipated. In such case, the validity of the warrant might be questioned. However, the board may anticipate a fund so that the alteration of the effective date of the division of state moneys between the teachers' fund and the incidental fund would not affect the validity of a warrant in any manner. (See enclosed opinions of Attorney General to George V. Farris dated September 6, 1938, and Haskell Holman dated July 14, 1954.)

CONCLUSION

It is, therefore, the opinion of this office that a county treasurer should place 80% of the state school moneys received by him for a common school district in the teachers' fund of such district immediately upon receipt thereof and should place the remainder of such money in either the teachers' fund or incidental fund of such district when and in the proportion as directed by the board of such district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Encs (2)

SHERIFFS:
PEACE AND POLICE OFFICERS:
HEALTH OFFICERS:

Who may make application for commitment
for temporary confinement and take persons
into custody and transfer to hospital under
Secs. 202.800 and 202.803, RSMo Cum. Supp.
1955.



October 8, 1957

Honorable C. Frank Reeves
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Sir:

This will acknowledge receipt of your request to construe Sections 202.800 and 202.803, RSMo Cum. Supp. 1955, and render an official opinion as to whose duty it is to make an application for temporary commitment to a hospital as provided therein.

Section 202.800, supra, reads:

"1. Any individual may be admitted for temporary confinement to a hospital upon:

"(1) Written application to the hospital by any health or police officer or any other person stating his belief that the individual is likely to cause injury to himself or others if not immediately restrained, and the grounds for such belief; and

"(2) A certification by at least one licensed physician that he has examined the individual and is of the opinion that the individual is mentally ill and, because of his illness, is likely to injure himself or others if not immediately restrained.

"2. An individual with respect to whom such a certificate has been issued may not be admitted on the basis thereof at any time after the expiration of three days after the date of examination.

Honorable C. Frank Reeves

"3. Such a certificate, upon indorsement for such purpose by a judge of any court of record of the county in which the individual is present, shall authorize any health or police officer to take the individual into custody and transport him to a hospital as designated in the application." (Underscoring ours.)

Section 202.803, supra, reads:

"1. Any health or police officer may take an individual into custody, apply to a hospital for his admission and transport him thereto for temporary confinement if such officer has reason to believe that;

"(1) The individual is mentally ill and, because of his illness is likely to injure himself or others if allowed to be at liberty pending examination and certification by a licensed physician;
or

"(2) The individual, who has been certified under section 202.800 as likely to injure himself or others, cannot be allowed to remain at liberty pending the indorsement of the certificate as provided in that section.

"2. The application for admission shall state the circumstances under which the individual was taken into custody and the reason for the officer's belief." (Underscoring ours.)

It is apparent that the General Assembly in enacting Section 202.800, supra, relative to who may make applications for temporary commitment to hospitals, purposely made it very broad in order to find someone available for that purpose. In some counties and certain localities it is relatively easy to find some one to perform this function under the statute as a police or health officer, however, in others this may be more difficult and it might involve quite a problem, hence it will be seen that the Legislature, after providing any health or police officer may make such application, also provided that any other person may do so.

Honorable C. Frank Reeves

The latter statute quoted provides who may make application for confinement of any individual who might injure himself or someone else if allowed to be at liberty, take him into custody and transport him to the hospital. This is not so broad as the former statute and does not vest such authority in any other person.

By use of the words "or any other person" in Section 202.800, supra, the Legislature must have intended that any individual could likewise make an application for temporary confinement.

A basic rule of statutory construction is first to seek the lawmakers' intention, and, if possible, effectuate that intention. *Laclede Gas Company vs. City of St. Louis*, 253 S.W. 2d. 832, 363 Mo. 842.

You inquire as to whether or not the sheriff is a police officer as referred to in the foregoing statute. We believe the Legislature in passing such statute was attempting not to limit the scope of authority, but had in mind that by using police officer it would include persons having statutory authority that dealt with keeping the peace or enforcing the laws.

Under Section 57.110, RSMo 1949, sheriffs are conservators of peace within their respective counties. Furthermore, police officers are peace officers.

In view of the foregoing, we believe that the General Assembly, in passing the foregoing statutes, fully intended that a sheriff should be included in the reference to "police officer." However, it is well to remember that while the foregoing statute vests authority in the sheriff to act thereunder, he has certain discretion in the matter such as to determine if any person should be so temporarily confined.

CONCLUSION

Therefore, it is the opinion of this Department that a sheriff is a police officer as referred to in Sections 202.800 and 202.803, Cum. Supp. 1955. However, the sheriff exercises discretion in determining who comes within the provisions of the foregoing statutes.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

ARH:mw

John M. Dalton
Attorney General

COSTS:	County liable for costs of prosecution
CRIMINAL COSTS:	for failure to report accident under
CRIMINAL LAW:	Safety Responsibility law if defendant
SAFETY RESPONSIBILITY LAW:	is tried and acquitted, but no costs
MOTOR VEHICLES:	chargeable if prosecution based upon
DIRECTOR OF REVENUE:	affidavit of Director of Revenue fails
OFFICERS:	from any other cause.



January 21, 1957

Honorable James T. Riley
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Mr. Riley:

This is in response to your request for opinion dated
October 26, 1956, which reads as follows:

"Section 483.610, R.S. Mo. 1949, as amended,
provides that in each criminal proceeding
before a magistrate, a fee of \$5.00 shall
be charged as part of the court costs. This
fee is then remitted to the Director of
Revenue of the State of Missouri in accord-
ance with Section 483.615.

"Section 545.280, R.S. Mo. 1949, provides
that the prosecuting witnesses shall be
liable for the costs in case the prosecution
shall fail from any cause or the defendant
be acquitted.

"Section 550.050, provides that the county
pay all the costs when the prosecution is
commenced by a public officer and the de-
fendant is acquitted.

"The Legislature has placed the 'Safety
Responsibility Act' under the supervision
and direction of the Director of Revenue.
Your office previously ruled that Cole
County is the only venue for criminal prose-
cutions arising under that Act. These
prosecutions are instituted upon receipt
of an affidavit from the Supervisor of the
Safety Responsibility Unit under the direc-
tion of the Director of Revenue. We find

Honorable James T. Riley

that a number of the defendants can not be found in the State of Missouri, and therefore, the prosecutions must be dismissed.

"In those cases where the prosecution is dismissed or the defendant acquitted, who is liable for the costs? Since the State of Missouri is the complainant and the state does not pay court costs, would these cases be excepted from the provisions of Sections 483.610-615?"

At common law, costs, as such, in a criminal case were unknown. The basis for this is said to be that the King should neither pay nor receive costs; the first being his prerogative and the latter beneath his dignity. *State v. Henley*, 98 Tenn. 665, 41 SW 352, 357, 39 L.R.A. 126. As a consequence, it is the rule, as well in criminal as in civil cases, that the recovery and allowance of costs rest entirely on statutory provisions - that no right to or liability for costs exists in the absence of statutory authorization. Such statutes are penal in their nature and are to be strictly construed. *Cramer v. Smith*, 350 Mo. 736, 168 SW2d 1039, 1040; 20 C.J.S., Costs, Section 435, page 677.

The question of the liability for costs in a prosecution for failure to file a report under the Motor Vehicle Safety Responsibility Act, where the prosecution is dismissed or the defendant acquitted, is governed by Sections 545.050, 545.280 and 550.040 or 550.050, RSMo 1949. The reason we say Sections 550.040 or 550.050, is that Section 550.040 is applicable to felonies and misdemeanors, while Section 550.050 is applicable to prosecutions for the recovery of fines, penalties and forfeitures. For reference convenience, we now quote those sections:

Sec. 550.040. "In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Honorable James T. Riley

Sec. 550.050. "1. Every person who shall institute any prosecution to recover a fine, penalty or forfeiture shall be adjudged to pay all costs if the defendant is acquitted although he may not be entitled to any part of the same.

"2. When such prosecutions are commenced by a public officer whose duty it is to institute the same, and the defendant is acquitted, the county shall pay the costs; if he is convicted, and unable to pay the costs, the county shall pay all the costs, except such as were incurred on the part of the defendant."

Inasmuch as the failure to report an accident is made punishable by a fine not in excess of five hundred dollars by the provisions of Section 303.370, RSMo Cum. Supp. 1955, the determination of whether this constitutes a "fine" within the meaning of Section 550.050 or a misdemeanor so as to fall within the purview of Section 550.040 would be difficult. There is language in State ex rel. Howell County v. West Plains Telephone Co., 232 Mo. 579, 584, 135 SW 20, which would indicate that if the statute makes an offense punishable by fine it constitutes a criminal offense, but if the remedy is a proceeding to recover a fine it is civil in nature. In either event, it may be initiated by information or indictment. Sections 545.010 and 545.020, RSMo 1949. For further cases on this problem, see State v. Huiatt, 31 Mo. App. 302; State v. Flick, 167 Mo. App. 6, 150 SW 1119.

For the purposes of this opinion it is not necessary to determine which of these statutes is governing because under either the ultimate conclusion is the same.

Under both of these sections, absent a conviction, the only instance in which the county is liable for the costs is if the defendant is acquitted. Neither of these sections contains the clause, "in case the prosecution shall fail from any cause," as is found in Section 545.280, RSMo 1949, but fastens the liability for costs on the county only if the defendant is acquitted. Consequently, if the defendant is apprehended, prosecuted for failure to file the accident report required by the Motor Vehicle Safety Responsibility law, tried and acquitted, the county is liable for the costs. However, under the rule of strict construction, if the prosecution fails from any other cause, the county is not liable for the costs.

Honorable James T. Riley

If Section 550.050 is applicable, the one commencing the prosecution, i.e., the Director of Revenue, is not liable in any event because he is a public officer whose duty it is to institute the same. Section 305.290, RSMo Cum. Supp. 1955. Consequently, if Section 550.050 governs and the prosecution fails from any cause other than acquittal, no one is liable for the costs.

If Section 550.040 is applicable and the prosecution fails from any cause other than acquittal, it is necessary to examine the other statutes to see whether a prosecutor is liable or it is otherwise provided by law.

Section 545.280, RSMo 1949, reads as follows:

"When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 545.250, the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be endorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case."

It is necessary to read this section in connection with Section 545.050, RSMo 1949, which provides the cases in which an indictment is required to be endorsed by a prosecutor. The latter section provides that:

"1. No indictment for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, and no indictment for the disturbance of the peace of a person, or for libel or slander, shall be preferred unless the name of a prosecutor is endorsed as such thereon, thus: 'A B, prosecutor,' except where the same is preferred upon the

Honorable James T. Riley

information and testimony of one or more grand jurors, or of some public officer in the necessary discharge of his duty.

"2. If the defendant be acquitted or the prosecution fails, judgment shall be entered against such prosecutor for the costs."

Section 545.240, RSMo 1949, also makes the terms and restrictions as to endorsement of witnesses in cases of indictments applicable to an information.

Anyone having knowledge of the commission of a crime may make his affidavit and file the same with the clerk of the court or the prosecuting attorney, but he will not be liable for the costs unless he is deemed the prosecuting witness as defined in Section 545.280, supra. If failure to file the report required by Section 303.040, RSMo Cum. Supp. 1955, is made a misdemeanor by Section 303.370, RSMo Cum. Supp. 1955, it is still not one of the classes of cases wherein an indictment is required to be endorsed by a prosecutor. Consequently, under this section, the one making the affidavit upon which the prosecution is based would not be liable for the costs, whether there was an acquittal or the prosecution failed for any other cause, because he is not deemed a prosecuting witness for the purpose of affixing costs. See State v. Hulatt and State v. Flick, supra.

In summation, if the question of costs in a prosecution under Section 303.370(1), RSMo Cum. Supp. 1955, is governed by Section 550.040, supra, the county would be liable for the costs if the defendant is tried and acquitted, because the one making the affidavit is not deemed the prosecuting witness under Section 545.280, supra, for the purpose of affixing costs. If under Section 550.050, supra, and the defendant is tried and acquitted, the county would be liable for the costs because the Director of Revenue is a public officer whose duty it is to institute the prosecution and, consequently, not liable for the costs. Since liability for costs is not presumed, if the prosecution fails from any cause other than acquittal, neither the county nor any person is made liable therefor. Consequently, in that event, no costs are chargeable.

CONCLUSION

It is the opinion of this office that the county is liable for the costs of a prosecution for failure to report a motor vehicle accident commenced under Section 303.370, RSMo Cum. Supp.

Honorable James T. Riley

1955, if the defendant is tried and acquitted, but there are no costs chargeable where the prosecution is based upon the affidavit of the Director of Revenue and fails from any cause other than acquittal.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

LOCKER PLANTS:
FOOD AND DRUGS:
FROZEN FOOD LOCKERS:
PROSECUTING ATTORNEY:
INJUNCTION:
CRIMINAL LAW:



Prosecuting attorney can file criminal charges or institute injunction proceedings against person operating a locker plant without a license as required by law; and prosecuting attorney can institute injunction proceedings against a person who violates any provisions of the locker plant law, including the one requiring an annual license as mentioned above.

January 11, 1957

Honorable Clyde E. Rogers
Prosecuting Attorney
Howard County
Fayette, Missouri

Dear Mr. Rogers:

On November 28, 1956, your immediate predecessor to the office of Prosecuting Attorney requested an official opinion from this office which reads as follows:

"Section 196.515 RSMo 1949 states that the provisions of Section 196.450 to 196.515 may be enforced by injunction. No criminal penalty is provided for the wilful refusal to obtain a license upon payment of the required fee. What is the duty of the Prosecuting Attorney when an individual operating a locker plant in the county refuses to obtain a license by payment of the required fee?"

Chapter 196, RSMo 1949, and the Missouri Cumulative Supplement 1955, covers and is entitled "Food and Drugs." In 1945, the General Assembly enacted fourteen new sections to be added to this chapter, which are Sections 196.450 to 196.515, RSMo 1949, and they are entitled "An Act to Regulate the Operations of Plants for the Cold Storage of Foods in Individual Lockers." This is a proper exercise of the state's police power to protect the health and safety of the public. See *Bacon v. Walker*, 27 Sup. Ct. 289, 204 U.S. 311.

These fourteen sections do not say that anyone who violates their provisions shall be guilty of a misdemeanor or a felony, but they convey the idea that violators of their provisions will not go unpunished. Section 196.455, supra, says:

"It shall be unlawful for any person, firm, copartnership or corporation to operate a locker plant in this state unless such person, firm, copartnership or corporation has secured an annual license therefor from the department. * * *."

If a certain individual in Howard County is operating a locker plant and refusing to obtain a license as required by the section

Honorable Clyde E. Rogers

mentioned above, he is doing an "unlawful act." "It is an act contrary to law," (See Webster's, Black's, and Bouvier's definition of an unlawful act.) and he is accountable. Chapter 564, RSMo. 1949, is entitled "Offenses Against Public Health and Safety." Section 564.320 provides as follows:

"If any person shall carry on or transact any business or occupation without license therefor, when such license is required by any law of this state, he shall be deemed guilty of a misdemeanor, and when no other punishment is prescribed for such offense, be fined in any sum not exceeding one hundred dollars or be imprisoned in the county jail not exceeding three months, or both."

This section is applicable to our problem here. Therefore, we hold a prosecuting attorney can file criminal charges against a person who operates a frozen food locker without a license as required by law. However, we might point out that this criminal statute applies only when the individual is violating Section 196.455, supra (which requires a license), and does not apply where the individual is violating other sections of the locker plant law.

This is not, however, the only remedy available to the prosecuting attorney. There is another. We might at this point call your attention to the fact that this other remedy, which is discussed below, is applicable to an individual who violates any provisions of the locker plant law, including that section (Section 196.455, supra) requiring an annual license.

Section 196.515, supra, provides: "Injunction may issue by any court of competent jurisdiction to enforce the provisions hereof." Though the statute does not expressly authorize the prosecuting attorney to bring the action, the purpose of the regulation of locker plants is for the protection of the health and safety of the public, and therefore, the State of Missouri is vitally interested in the violation of laws wherein the public is concerned. Further, if no one could institute the proceedings, the law would be meaningless and of no effect, which was not the intention of the legislature. Also, this is a county and not a state-wide matter. It is within the jurisdiction of the local prosecuting attorney and he may institute injunction proceedings to enforce the provisions of the locker plant law. As stated in State v. Sullivan, 283 Mo. 546, 224 S.W. 327, 331 (1,2):

"* * * The rule is that such prosecuting officer cannot proceed in the name of the state, save and except the matters involved are matters arising within and pertaining to the jurisdiction of such prosecuting

Honorable Clyde E. Rogers

officer. In other words, they must be matters which concern the state in the limited territory over which such officer has control or in which he has power to act. His limit is the county for which he was elected. Westhues, as prosecuting attorney of Cole County, can use the name of the state in such matters in which the state is interested within the confines of the said county of Cole.* * *."

Section 56.060, RSMo. 1949, expressly provides that "the prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned * * *." Section 56.070, RSMo. 1949, provides that "He shall prosecute or defend, as the case may require, all civil suits in which the county is interested * * *." And as stated in State v. Powell, 359 Mo. 321, 221 S.W. 2d 508, 510 (4), "Neither the word 'concerned' nor the word 'interested' is defined, but one of the definitions given for the word 'concerned' is 'affected, disturbed, troubled, interested; as to be concerned for one's safety.' Webster's New International Dictionary (Second Edition). There can be no doubt that the state was interested, concerned and affected by the illegal transfer and dissipation of the Teachers' Funds of this school district."

There is dictum which is in point in State v. Kurn, Mo.App., 119 S.W. 2d 62, 64 (1,2), which says, "It may be conceded that there are circumstances under which the state acting through the prosecuting attorney may proceed by injunction to obtain relief. As we understand the law, where such a proceeding is justifiable, it is where there is an infringement of the rights of the public involved. * * *."

In none of the cases mentioned above were there statutes expressly authorizing the prosecuting attorney to act, but he was allowed to act in the name of the state where the latter had an interest in the case. We hold the State of Missouri is interested, concerned, and affected when its laws relating to the operation of locker plants are being violated.

CONCLUSION

It is therefore the opinion of this office that if a person, firm, copartnership or corporation is operating a locker plant without a license as required by Section 196.455, supra, the local prosecuting attorney can institute injunction proceedings against said violator or file criminal charges against him; and if a person is violating other sections of the locker plant law other than the section requiring an annual license, the prosecuting attorney can file injunction proceedings against such person to enforce the provisions of the locker plant law.

Honorable Clyde E. Rogers

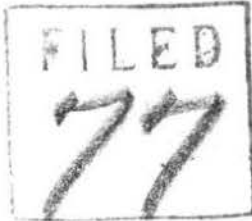
The foregoing opinion, which I hereby approve, was prepared by my Assistant, George E. Schaaf.

Yours very truly,

JOHN M. DALTON
Attorney General

GES/b1

AGRICULTURE:
COMMUNITY SALES:



The community sales law and the regulations adopted thereunder do not apply to sales which deal only in horses and not other species of livestock. Community sales and stockyards markets which are subject to the provisions of the Packers and Stockyards Act (7 U.S.C.A. Sec. 181 et seq.) or to the provisions of Chapter 276 RSMo 1949, are by virtue of such state or federal regulation exempted from the provisions of the Missouri Community Sales Law.

January 15, 1957

L. A. Rosner, DVM
State Veterinarian
Jefferson Building
Jefferson City, Missouri

Dear Dr. Rosner:

Reference is made to your request for an official opinion of this office, which request reads in part as follows:

"I respectfully request a reply from your office as to whether or not a license is and should be required for these community sales dealing only in horses.

"Our second problem concerns the Community Sales and Stockyards Markets which are without the Federal Public Stockyards Inspection Services of the United States Department of Agriculture but which operate under the Federal Stockyards and Packers Act. The Federal Stockyards and Packers Act is intended for the regulation of marketing transactions in stockyards or sales of a particular size. It requires the bonding of all commission firms, traders and dealers who carry on business within the sale or yards. The Law makes no provision for the sanitary conditions of the yards and for the health inspection of the livestock sold therefrom.

"Our Community Sales Law specifies that it shall apply to all such sales and stockyards markets which are not under Federal Inspection. The intent of the Community Sales Law is to protect the purchaser of the various classes of livestock by means of the health inspections and maintenance of satisfactory sanitary conditions. We feel that those community sales and stockyards markets which are not operat-

L. A. Rosner, DVM.

ing under Federal Public Stockyards Inspection Service should be licensed and bonded, and should maintain approved veterinary inspection of livestock as required under the Community Sales Law.

"We would very much appreciate your opinion as to whether or not our position is correct in maintaining that such sales or yards which are not under public stockyards inspection should be licensed and should comply with all other provisions of the Community Sales Law and Regulations."

The questions asked will be treated in the order presented, The "community sales law", to which you refer, is contained in Chapter 277, RSMo 1949. Section 277.030 provides that no person "shall engage in the business of operating a community sale unless duly licensed as herein provided." Section 277.020, para. (4) defines the term "community sales" as follows:

"The term 'community sales' means any series of sales, exchanges, or purchases of any livestock made at regular or irregular intervals at an established place in this state, by any person, directly or indirectly, for or on account of the producer or producers, consignor or consignors thereof, at public auction or at private sale, except that this term shall not apply to established markets operating under federal or state regulations, or to any public or private farm or purebred livestock sale."

The term "livestock" is defined in the same section as follows:

"The term 'livestock' shall mean and include cattle, swine, sheep, goats, and poultry."

We note that the term "livestock" is defined to mean "cattle, swine, sheep, goats, and poultry."

It is a well known canon of statutory construction that the expression of one thing implies the exclusion of another thing. State ex rel. Kansas City Power and Light Co. v. Smith, 111 SW2d 513, 342 Mo. 75. Applying such rule we are of the opinion that the express mention of certain species of livestock impliedly excludes other species not expressly mentioned. Therefore, since horses are not specifically included in the definition of the term "livestock" we are of the opinion that the community sales law and the regulations adopted thereunder do not apply to sales which deal only in horses, and in no other species of livestock.

L. A. Rosner, DVM.

From your letter of request, and from recent telephone conversations with you, we understand your second question to be whether community sales and stockyards markets, which are subject to the provisions of the Packers and Stockyards Act (7 U.S.C.A., Sec. 181 et seq.) are by virtue of such regulation exempt from the provisions of Chapter 277 RSMo 1949, under authority of Section 277.020. The purpose of the Packers and Stockyards Act was to remedy abuses that had grown up in large stockyards in various parts of the county, whereby resources and shipments were charged excess and discriminatory rates for services rendered in handling and selling livestock. Allen C. Driver Inc. v. Mills, 86 Atl.2d 724. As you have stated in your opinion request, said law makes no provision for sanitary conditions for the sanitary condition of the yards or for the health inspection of livestock sold therefrom, which is, of course, one of the prime purposes of the Missouri Community Sales Law.

It is to be noted that Section 277.020 RSMo 1949, exempts from the operation of the Community Sales Law "established markets operating under federal or state regulations".

Under date of July 14, 1954, this office issued to you an official opinion holding that certain markets which were subject to the provisions of Chapter 276 RSMo 1949, and the Packers and Stockyards Act were thereby exempted from the operation of Chapter 277. This conclusion was reached notwithstanding the fact that neither of the referred-to acts deal with the sanitation of yards or the health inspection of livestock sold therefrom. A copy of said opinion is enclosed herewith.

We have re-examined said opinion and believe that the conclusion there reached is correct, and correctly answers the question at hand. We are unable to read into the provisions of Section 277.020, when the Legislature has failed to so provide, that only those markets which are subject to a similar type of regulation under either state or federal law would thereby be exempted from the operation of Chapter 277. Said exemption merely refers to state or federal "regulation", without specifying the type, and therefore we are led to the conclusion that any type of regulation would qualify.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that the community sales law and the regulations adopted thereunder do not apply to sales which deal only in horses and no other species of livestock.

L. A. Rosner, DVM.

It is the further conclusion of this office that community sales and stockyards markets which are subject to the provisions of the Packers and Stockyards Act (7 U.S.C.A., Sec. 181 et seq.) or to the provisions of Chapter 276 RSMo 1949, are by virtue of such state or federal regulation exempted from the provisions of the Missouri Community Sales Law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/ld

CREDIT UNIONS: Right to proceeds of insurance upon life of shareholder depends upon term of contract of insurance.



January 21, 1957

Honorable J. A. Rouveyrol
Commissioner of Finance
Department of Business and
Administration
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this office, which reads as follows:

"We have received the following letter from Mr. Russell Maloney, Attorney at Law, Kansas City, representing the various Missouri credit unions and relating to the disposition of life savings insurance:

'There exists among Missouri credit unions some misunderstanding regarding the disposition of life savings insurance, commonly called share insurance, in connection with shares held in joint tenancy. As you know, a large number of credit unions carry this group insurance which on the face of the policy provides as follows:

CUNA MUTUAL INSURANCE SOCIETY
(Hereinafter called CUNA Mutual)

will pay to the

BLANK CREDIT UNION
Kansas City, Missouri
(hereinafter called the Credit Union)

'The maximum that can be paid under the policy is \$1,000.00 depending on the amount in the share account.

'Upon the death of the member the problem arises whether or not when the money from the

Honorable J. A. Rouveyrol

insurance company is paid into the credit union it becomes a part of the survivors account and can be credited to the survivors account along with the share account, and subsequently paid to the survivor of the joint tenancy.

'The standard joint share account agreement used by most, if not all, Missouri credit unions in part provides:

"The joint owners of this account, hereby agree with each other and with said credit union that all sums now paid in on shares, or heretofore or hereafter paid in on shares by any or all of said joint owners to their credit as joint owners with all accumulations thereon, are and shall be owned by them jointly, with right of survivorship * * *"

'Would the share insurance flow to the survivor along with the share account under the above quoted provision of the joint share account agreement?

'It has come to our attention that in at least two states credit unions have been informed that a "beneficiary" may be designated to receive amounts added to the deceased members account by reason of the share insurance. Information has also been received that in at least one state the Bureau of Federal Credit Unions have permitted the designation of a "beneficiary" by contract between the credit union and the joint tenants. It would seem that this procedure may be in conflict with an opinion you received from the office of Attorney General, John M. Dalton, dated July 16, 1953, which was prepared by Assistant Attorney General Robert R. Welborn. The opinion is not on the same point.

'Applying the proceeds of the life savings insurance to the survivors account or passing it to the survivor could possibly subject a credit union to litigation, which would be of

Honorable J. A. Rouveyrol

concern to your department in the exercise of your regulatory and supervisory power as set forth in Section 370.100, R. S. Mo. 1949.

'In behalf of the Missouri Credit Union League, for the benefit of all Missouri credit unions, I wish to request a ruling from you as to whether share insurance goes to the survivor along with the share account or whether it is subject to administration under the Missouri Probate Code. Also whether a beneficiary can be designated by contract between the members and the credit union.

Respectfully submitted,

/s/ Russell Maloney
Russell Maloney.'

"As requested in the last paragraph of the letter, I will appreciate it if you would let me have an opinion as to whether share insurance goes to the survivors along with the share account or whether it is subject to administration under the Missouri Probate Code. Furthermore, I should like to know whether a beneficiary can be designated by contract between the members and the credit union."

As a matter of general law, in the absence of statutory regulation, which we do not find in Missouri, the payment of the proceeds of an insurance policy is a matter of contract among the parties to the contract of insurance:

"The primary and undoubted intent of a contract of life insurance is that the company shall make payment on the death of insured; and the question as to who is entitled to payment is a secondary one and contingent on the circumstances. The policy is said to be the measure of the rights of everybody under it, and in cases involving the right to the proceeds, the law of contracts, and not that of inheritance, is controlling.
* * *

46 C.J.S., Insurance, Section 1154, p. 37.

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We are dealing here with a group insurance policy. However, "it should be observed that while group insurance is distinctive in some respects, the right of one claiming under a group policy to recover thereon is governed in many respects by the general principles of the law of insurance * * *." 29 Am. Jur., Insurance, Section 1370, p. 1027.

The details of the policy of insurance here involved and the conditions under which it is granted to credit union shareholders are not contained in your opinion request. Inasmuch as the contents of the policy and the application or certificate (if any) of the shareholder are of primary significance, we are in no position to state any definite opinion as to whether or not the proceeds of such insurance should, upon the death of one party to a joint share account, be paid to the surviving shareholder or to the estate of the deceased joint shareholder. Furthermore, inasmuch as determination of this question would depend upon the terms of the contract of insurance and be a matter of general law, it would not appear to be subject to your regulation or control. If credit unions are in doubt as to the proper party to whom to make payment and as they may be liable for double payments, it might be well for your office, in its supervisory and regulatory capacity, to insist that the contracts of insurance be sufficiently clear and definite to eliminate such questions.

As for the second inquiry, the matter again is one of general law not peculiarly within the scope of your regulatory authority. We perceive, however, no objection, as a matter of law, to the designation of a beneficiary to whom the proceeds of such policy should be paid upon the death of the shareholder. The Supreme Court of Missouri recognized the right of the insured in similar circumstances to designate a beneficiary to whom the proceeds of the policy should be paid. The case of Mutual Bank & Trust Co. v. Shaffner, 248 SW2d 585, involved the authority of a bank to participate in an insured life savings account plan, which appears to be somewhat similar to that involved in the insurance upon shareholders of credit unions. Under the arrangement there involved, the bank obtained a group savings certificate policy from an insurance company under which holders of insured life savings certificates in the bank were to be insured in an amount equal to the difference in their deposits under the insured savings account and the amount of the purchaser's certificate, not to exceed two thousand dollars. The depositor could purchase the certificate for himself and as "trustee" for a named "beneficiary" or for himself and a named co-owner. One of the questions raised was the matter of privity of contract between the insurer and the depositor-assured. In passing on this question the court went into the matter of designation of a beneficiary by the depositor, and stated, 248 SW2d 1.c. 591:

" * * * A group policy is a contract between an insurer and an individual or a corporation for the benefit of third persons. 'Basically, it resembles or is a simple third party beneficiary contract. It is true that every life insurance policy is such a contract, but under the group policy the beneficiary is also the insured.' Crawford and Harlan, Group Insurance, Sec. 15, p. 30. The assured's rights are determined by the policy, and either he or his beneficiary may maintain an action against the insurer upon the policy. See *Gallagher v. Simmons Hardware Co.*, 214 Mo. App. 111, 258 S.W. 16; *White v. Prudential Ins. Co. of America*, 235 Mo. App. 156, 127 S.W. 2d 98; *Adair v. General American Life Ins. Co.*, supra.

"We note that the insurer has not raised the issue of the bank's insurable interest. See *Baker v. Keet-Rountree Dry Goods Co.*, 318 Mo. 969, 2 S.W. 2d 733, 738, 3 S.W. 2d 1003. Defendants concede that in 'employees' group insurance, the employment factor has been held to give rise to insurable interest necessary to the validity of such group contracts.' However, they point out, there is no employment factor in this case, and the depositor is not the bank's debtor. They inquire: 'If the bank has an insurable interest in its depositors' lives, how is it measured? If the bank lacks an insurable interest in the life of the depositor as a creditor, officer or employee, is not the contract a wagering contract?'

"An insurable interest is not required of the bank. The group insurance contract is one between the insurer and the bank for the benefit of certain depositors. When a depositor becomes insured thereunder, his rights, and the rights of the beneficiary whom he has designated, are measured and determined by the group policy. *Gallagher v. Simmons Hardware Co.*, *White v. Prudential Ins. Co. of America*, and *Adair v. General American Life Ins. Co.*, supra. The insurance proceeds payable upon the death of the insured depositor inure to the benefit of such beneficiary. At most, the bank is a mere conduit through whom the insurance proceeds are paid to the named beneficiary. Unquestionably, every person has an

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insurable interest in his own life and 'he may insure it for the benefit of any person whom he sees fit to name as beneficiary,' Walker v. General American Life Ins. Co., Mo. Sup., 141 S.W. 2d 785, 787. Thus, the insurable interest which the insured depositor has in his own life makes unnecessary the existence of any insurable interest in the bank."

In view of the court's construction of policies of insurance, as noted in the above case, as contracts for the benefit of the third person, this feature distinguishes the designation of a beneficiary in such circumstances from the situation involved in the opinion to you dated July 16, 1953, and referred to in your opinion request, in which we held that a shareholder may not designate a beneficiary to receive the shares of a credit union upon his death without administration. In that opinion we pointed out that in the case of Kansas City Life Ins. Co. v. Rainey, 353 Mo. 477, 182 SW2d 624, 155 A.L.R. 168, the court upheld the right of a beneficiary designated by the purchaser of an investment annuity policy to receive the proceeds of such contract upon the death of the purchaser as against the executor of the estate of the purchaser, on the grounds that the contract was one entered into for the benefit of a third party.

We also mentioned in that opinion that in that case the Supreme Court cited the case of In re Koss' Estate, 106 N.J. Eq. 323, 150 A. 360, as upholding the right of a third party beneficiary under a contract to receive the proceeds of such contract upon the death of a party as against the personal representative of the decedent. That case involved the designation of a beneficiary in the event of the death of a participant in an employee stock purchasing plan. The court upheld such designation as against the contention that it was a testamentary disposition. In doing so, the court stated:

"Instead of regarding the designation of the beneficiary as a disposition of property, we regard it as the mere naming of a person for whose benefit a contract is made. We believe this must be so since there never was any specific property to which Gertrude Koss was entitled in her lifetime."

In view of the fact that contracts of insurance are generally regarded, insofar as the rights of beneficiaries are concerned,

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as contracts for the benefit of a third party, we would see no reason why the insurance here involved could not be disposed of in the same manner as ordinary insurance. Here again, however, the right to do so must depend primarily upon the contract of insurance and the contract between the credit union and the shareholder.

CONCLUSION

Therefore, it is the opinion of this office that the right to the proceeds of a group insurance policy covering joint shareholders in a credit union account upon the death of one of the joint shareholders must be determined by the contract of insurance, including the contract between the insurer and the credit union and that between the credit union and the shareholders.

We are further of the opinion that, subject to the provisions of the contract of insurance, the shareholder may dispose of proceeds of any such insurance by the designation of a beneficiary to receive such proceeds upon the death of the shareholder.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

MISSOURI VETERINARY BOARD:
ADMINISTRATIVE AGENCIES:
INVESTIGATORS:

Missouri Veterinary Board does not have the power or authority to hire an attorney. All investigations on behalf of said Board must be conducted by the Board itself or any of the members thereof whom the Board may authorize, and said Board does not have the power or authority to hire an investigator.



December 4, 1957

Dr. L. A. Rosner
Chairman Pro Tem
The Missouri Veterinary Board
P. O. Box 630
Jefferson City, Missouri

Dear Dr. Rosner:

This is in acknowledgement of your opinion request to this office dated October 8, 1957, and reads as follows:

"1. Is the Board empowered under the law to employ an attorney to advise with it and to remunerate him on a reasonable basis? If so, is such attorney an employee of the state although he is only reimbursed for services performed?

"2. Is the Board empowered to employ an investigator and to remunerate him for his reasonable services? If so, is such investigator an employee of the state although he will only be reimbursed for his actual services performed?"

With regard to your first inquiry as to hiring of an attorney by the board, this office cannot find a provision in the law creating and governing the Veterinary Board, which law is Chapter 340, RSMo 1949 and Cum. Supp. 1955, which specifically gives to the Veterinary Board the power and authority to hire an attorney to assist the board in the performance of its duties. In instances where the Legislature has deemed it advisable that a state board be given the power to hire an attorney, the Legislature has done so by enacting into the law, creating and governing that board a specific provision giving to that board the power to hire an attorney. Such is the situation with relation to the Board of Accounting, Section

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326.180, RSMo 1949; Board of Architects and Professional Engineers, Section 327.180, RSMo 1949; Board of Dentistry, Section 332.310 and the Board of Pharmacy, Section 338.140.

Inasmuch as the Legislature has not enacted a provision specifically giving to the Veterinary Board the power and authority to hire an attorney as the Legislature has done with respect to other state boards, it is the opinion of this office that The State Veterinary Board does not have the power or authority to hire an attorney to assist said board in the performance of its duties.

The said board can, however, obtain legal counsel by making the request of the Attorney General provided for in Section 27.020, RSMo 1949. Paragraph 2 of Section 27.020, supra, reads as follows:

"2. The attorney general may, at the request of any officer, department, board, bureau, commission or agency of the state, assign assistant attorneys general to perform the duties prescribed by law before or upon behalf of such officer, department, board, bureau, commission or agency and may upon request as aforesaid, from time to time reassign such assistants.

With regard to the second inquiry as to the hiring of an investigator by the board, Section 340.140, Cum. Supp. 1955, provides in part as follows:

"4. The board, and any of its members it may authorize, shall have power to conduct investigations * * *."

This office cannot find a provision in the law creating and governing the Veterinary Board which specifically gives to the Board the power and authority to hire an investigator. Instead, by paragraph 4, Section 340.140, supra, the Legislature has prescribed that investigations on behalf of the Veterinary Board shall be conducted either by the Board itself or by any of the members of the Board whom the Board shall authorize.

Inasmuch as the Legislature has said who may conduct investigations on behalf of the Veterinary Board and has not

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specifically authorized the Board to hire an investigator, it is the opinion of this office that the Veterinary Board does not have the authority to hire an investigator.

CONCLUSION

It is the opinion of this office that the Missouri Veterinary Board does not have the power or authority to hire an attorney to assist said Board in the carrying out of its duties.

It is also the opinion of this office that the Missouri Veterinary Board does not have the power and authority to hire an investigator to assist the Board in conducting investigations, but that all investigations on behalf of said Board must be conducted either by the Board itself or by any member of the Board whom the Board may authorize.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard W. Dahms.

Yours very truly,

John M. Dalton
Attorney General

RWD/ba/bi

PRACTICE OF LAW: Collector of taxes of a fourth class county may fill
TAX DEED: in the blanks of a tax deed; he may not charge for
TAX SALE: filling in the blanks of a tax deed.
COLLECTORS:



January 23, 1957

Honorable J. B. Schnapp
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Schnapp:

This is in answer to your request for an official opinion from this office which reads as follows:

"Does the Collector of Taxes of a Fourth Class County have the authority to prepare a Tax Deed to purchaser at a Tax Sale and charge for the same; or is he barred from actually preparing the deed and charging for the same, because such an act might be construed the practice of law, and therefore be in violation of the statute against the practice of law by laymen."

Chapter 140, RSMo. and Mo. Cum. Supp. 1955, is entitled "Collection of Delinquent Taxes, Generally." In answering your specific question, it will be only necessary to discuss three sections within that chapter. They are Sections 140.420, 140.460, and 140.470, RSMo. 1949.

Section 140.420, RSMo. 1949, which reads as follows:

"1. If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, and on production of certificate of purchase, and in case the certificate covers only a part of a tract or lot of land, then accompanied with a survey or description of such part, made by the county surveyor, the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was in-

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ferior to the lien for taxes for which said tract or lot of land was sold.

"2. In making such conveyance, when two or more parcels, tracts, or lots of land are sold for the nonpayment of taxes to the same purchaser or purchasers, or the same person or persons shall in anywise become the owner of the certificates thereof, all of such parcels shall be included in one deed."

provides among other things that the collector, wherein a tax sale has been had, shall execute in the name of the state, a conveyance of the land sold to the purchaser. Section 140.460 RSMo. 1949, which reads as follows:

"1. Such conveyance shall be executed by the county collector, under his hand and seal, witnessed by the county clerk and acknowledged before the county recorder or any other officer authorized to take acknowledgments and the same shall be recorded in the recorder's office before delivery; a fee for recording shall be paid by the purchaser and shall be included in the costs of sale.

"2. Such deed shall be prima facie evidence that the property conveyed was subject to taxation at the time assessed, that the taxes were delinquent and unpaid at the time of sale, of the regularity of the sale of the premises described in the deed, and of the regularity of all prior proceedings, that said land or lot had not been redeemed and that the period therefor had elapsed, and prima facie evidence of a good and valid title in fee simple in the grantee of said deed; and such deed shall be in the following form, as nearly as the nature of the case will admit, namely:

Whereas, A. B. did, on the ___ day of ___, 19___, produce to the undersigned, C. D., collector of the county of ___ in the state of Missouri, a certificate of purchase, in writing, bearing date the ___ day of ___, 19___, signed by E. F., who at the last mentioned date was collector of said county, from which it appears that the said A. B. did, on the ___ day of ___, 19___, purchase at public auction at the door of the

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courthouse in said county, the tract, parcel or lot of land lastly in this indenture described, and which lot was sold to ___ for the sum of ___ dollars and ___ cents, being the amount due on the following tracts or lots of land returned delinquent in the name of G. H., for nonpayment of taxes, costs and charges for the year ___, namely: (here set out the lands offered for sale); which said lands have been recorded, among other tracts, in the office of said collector, as delinquent for the nonpayment of taxes, costs, and charges due for the year last aforesaid, and legal publication made of the sale of said lands; and it appearing that the said A. B. is the legal owner of said certificate of purchase and the time fixed by law for redeeming the land therein described having now expired, the said G. H. nor any person in his behalf having paid or tendered the amount due the said A. B. on account of the aforesaid purchase, and for the taxes by him since paid, and the said A. B., having demanded a deed for the tract of land mentioned in said certificate, and which was the least quantity of the tract above described that would sell for the amount due thereon for taxes, costs and charges, as above specified, and it appearing from the records of said county collector's office that the aforesaid lands were legally liable for taxation, and has been duly assessed and properly charged on the tax book with the taxes for the years ___.

Therefore, this indenture, made this ___ day of ___, 19___, between the state of Missouri, by C. D., collector of said county, of the first part, and the said A. B., of the second part, Witnesseth: That the said party of the first part, for and in consideration of the premises, has granted, bargained and sold unto the said party of the second part, his heirs and assigns, forever, the tract or parcel of land mentioned in said certificate, situate in the county of ___, and state of Missouri, and described as follows, Namely: (here set out the particular tract or parcel sold), To have and to hold the said last mentioned tract or parcel of land, with the appurtenances thereto belonging, to the said party of the second part, his heirs and assigns forever, in as full and ample a manner as the collector of said county is empowered by law to sell the same.

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In Testimony Whereof, the said C. D., collector of said county of ___, has hereunto set his hand, and affixed his official seal, the day and year last above written.

Witness: _____ (L.S.)
Collector of ___ County.

State of Missouri, ___ County, ss:

Before me, the undersigned, ___, in and for said county, this day, personally came the above-named C. D., collector of said county, and acknowledged that he executed the foregoing deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and seal this ___ day of ___, 19__.

(L.S.)"

provides among other things that the conveyance shall be executed by the county collector and under his hand and seal. You will note in the section quoted above that the form the collector must use and execute is set out in detail. The deed must be in substantial compliance with that form. Thus, it is apparent that someone must fill in the blanks of the deed form, but nowhere in Chapter 140 does it say who shall do it. It merely says the Collector shall "execute the deed." Thus, where a statute provides a certain person must execute a deed, it does not necessarily follow that person must actually prepare the deed by filling in the blanks. An executed deed is one that has been prepared in final form, signed, sealed and delivered. As authority for this proposition, see Mastin Realty and Mining Co. v. Commissioner of Internal Revenue, 130 F. 2d 1003, 1005 (1-2,3); and Tubbs v. Gatewood, 26 Ark. 128, 131.

Therefore, we hold a collector of taxes of a fourth class county may fill in the blanks of a tax deed, and further, that this limited act does not constitute the practice of law. The entire case of Hulse v. Criger, 363 Mo. 26, 247 S.W. 2d 855, discusses this problem thoroughly. That case is applicable to our problem here, At page 861 (6,7), the court says:

"[6,7] Likewise, general warranty deed and trust deed forms are so standardized that to complete them for usual transactions requires only ordinary intelligence rather than legal training. They are in fact less complicated than contracts for sale of real estate. We

know that these forms are furnished to the public at the offices of Recorders of Deeds through the state. We think the preparation of these instruments in closing transactions in which a real estate broker is acting as broker is so closely related to the transaction and the business of the broker as to be practically a part of it and that he is not engaging in unlawful practice of law to prepare them under such circumstances. The same thing is true of ordinary short term leases, notes, chattel mortgages and trust deeds in transactions which the broker procures. However, he cannot properly make separate charges, in addition to his commission, for preparing any instruments or engage in the field of conveyancing and drafting contracts or other legal instruments for the public generally, with or without separate charge. Such conduct would not be any part of his business as a real estate broker but would be placing the emphasis upon conveyancing as a practice of law instead of on his services as a broker; and it would also violate the provisions of RSMo. 1949, chap. 484, V.A.M.S."

Furthermore, the filling in of the blanks of a tax deed does not require a legally trained mind even though their filling in causes certain legal consequences to arise. The act of merely filling in the blanks of a tax deed is ancillary to the collector's main duties. At page 862, the court in *Hulse v. Griger*, supra, says:

" * * * We think the guiding principle must be whether under the circumstances the preparation of the papers involved is the business being carried on or whether this really is ancillary to and an essential part of another business. The simplicity or complexity of the forms, the nature and customs of the main business involved, the convenience to the public, and whether or not separate charges are made, all have a bearing upon the determination of this question."

The deed set out above has been adopted by the legislature, and the collector merely has to fill in the blanks. Although not expressly authorized to do so, as a practical matter, it would fall upon him to do this limited act to properly carry out his duties in these tax sale situations. In 67 C.J.S., Officers, Section 110, the rule, as to what acts public officers are authorized to do, is set out. On page 396, it says:

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"The duties of a public officer are usually prescribed by statute, but it has been observed that such statutes seldom, if ever, define with precise accuracy the full scope of such duties. Generally the duties of a public office include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes. * * *."

To further buttress the above argument, we call your attention to the case of Costello v. City of St. Louis, Mo. Sup., 262 S.W. 2d 591, 596 (7-9). The court intimates that it is the collector who actually fills in the blanks of a tax deed. It held:

"Under the Jones-Munger Act, the proceedings preliminary to and the sale of property by the Collector for delinquent taxes is administrative in character; such preliminary proceedings and sale are non-judicial and ex parte in their nature. No court guides the Collector or his proceedings, and he proceeds upon his own advice. In making his land delinquent list, in his notice and advertisement of sale, in his conduct of the sale, and in his preparation and execution of his certificate of purchase and his deed the Collector must strictly follow and observe the admonition of the statutes in this summary process of taking away from the citizen the title to the latter's land. * * *."

In answering the rest of your question, we hold the collector of taxes in a fourth class county cannot charge for filling in the blanks of the tax deed. However, for each tax deed a person applies for he may charge \$1.50, whether he fills in the blanks or whether someone else does it. This includes the acknowledgement. Section 140.470, RSMo. 1949, allows the collector this amount. It reads as follows:

"1. In case circumstances should exist requiring any variation from the foregoing form, in the recital part thereof, the necessary change shall be made by the county collector executing such deed, and the same shall not be vitiated by any such change, provided the substance be retained.

"2. The county collector shall be entitled to demand and receive from the person applying therefor, for each tax deed, one dollar and fifty cents, which shall include the acknowledgement."

Honorable J. B. Schnapp

If the collector charges an additional fee for filling in the blanks, this would amount to the practice of law. See Hulse v. Criger, supra, at page 863 (12,13). Also at this point, we call your attention to the famous case of Nodaway County v. Kidder, 344 Mo. 795, 129 S.W. 2d 857, 860, wherein the Supreme Court laid down the doctrine that if a public officer claims compensation for official duties performed, he must point out the statute authorizing such payment. In our case, the collector cannot point to any statute authorizing payment for filling in the blanks of a tax deed.

CONCLUSION

It is therefore the opinion of this office that a collector of taxes of a fourth class county may fill in the blanks of a tax deed, and such limited act does not amount to the practice of law; but that he may not charge for filling in said blanks, as this would amount to the practice of law, and further, he is not authorized to do so.

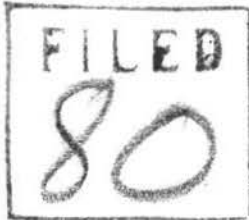
The foregoing opinion, which I hereby approve, was prepared by my Assistant, George E. Schaaf.

Yours very truly,

JOHN M. DALTON
Attorney General

GES/b1

CRIMINAL LAW: The provisions of §560.610, RSMo 1949, as amended by the Laws of 1955, do apply to any person of the age of twenty years or more who pleads guilty to a violation of any of the offenses enumerated in the aforesaid section.



May 9, 1957

Honorable Earl H. Schrader, Jr.
First Assistant Prosecuting Attorney
Jackson County
415 East Twelfth Street
Kansas City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Would you kindly advise the writer of your interpretation of the hereinafter set out section of Missouri Statute 560.610:

' * * * Provided, that the provision of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years.'

"I have in mind a situation where a defendant was under the age of twenty years at the time of the committing of the crime and later pleaded guilty after he reached the age of twenty-one."

Section 560.610, RSMo 1949, mentioned by you above, was amended by the Laws of 1955. However, that portion of the section which you quoted in your letter was not changed by the amendment.

It would appear to us to be clear that Section 560.610, RSMo 1949, as amended by the Laws of 1955, would apply in the situation which you set forth. The section clearly states that

Honorable Earl H. Schrader, Jr.

"the provisions of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years."

In the situation which you present to us, the person who committed the crime was at least twenty-one, and it would appear inferentially that, since the provisions of the statute did not apply to anyone who at the time of his conviction was under the age of twenty, it would apply to those persons who were twenty years of age or more, which is the situation in the case which you present to us.

CONCLUSION

It is the opinion of this department that the provisions of Section 560.610, RSMo 1949, as amended by the Laws of 1955, do apply to any person of the age of twenty years or more who pleads guilty to a violation of any of the offenses enumerated in the aforesaid section.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW:ld;ml

TAXATION: The state is not required to pay any part of the expenses incurred under two contracts entered into by and between St. Louis County, Missouri and two appraisal companies to furnish to the county an appraisal of certain designated taxable lands and improvements thereon in said county, together with certain manuals of procedure, field record cards, land value maps, indexing cards, etc.



November 18, 1957

Honorable William Scott
Supervisor, County Department
Department of Revenue
Jefferson City, Missouri

Dear Mr. Scott:

Reference is made to the request of your department for an official opinion, which request reads as follows:

"In view of a recent decision of the Supreme Court in the case of Milton A. Hellman, Appellant vs. St. Louis County, et al, Respondents, case No. 45842, wherein the court ruled that contracts entered into between St. Louis County and Doane Agricultural Service's, Inc. and Roy Wenzlick and Company, in connection with the re-appraisal program for St. Louis County, were valid, this department respectfully requests an official opinion from your office as to the payment of \$250,000.00, the approximate total expenditure called for in these contracts.

"As this is expended against the appropriation made to the assessor of St. Louis County for re-appraisal, is the State liable for any part of this \$250,000.00 and, if so, to what extent is the State liable?"

The facts developed in the case of Hellman v. St. Louis County, 302 SW2d 911, to which you refer, appear as follows.

St. Louis County is a county of the first class, operating under home rule charter. The county council, by a resolution, authorized the assessor and the county supervisor to enter into

Honorable William Scott

contract with two appraisal companies to undertake a parcel-by-parcel revaluation of designated real estate in said county. One appraisal company agreed to appraise all the taxable lands and improvements located within five designated school districts and the other company agreed to appraise all the taxable lands and improvements within nine other designated school districts in the county. Each contract also required the appraisal company therein named to prepare and deliver to the assessor certain manuals of procedure, field record cards, land value maps, indexing cards, identifying classification and other detailed information and services, and that the work be completed by March 1, 1957.

Each contract granted the county two options to employ the appraisal company therein named for the appraisal of other property in each of the years of 1957 and 1958.

In the Hellman case, resident taxpayers of St. Louis County sued to enjoin the enforcement of said contracts. The trial court found the issues in favor of the defendant and on appeal the Supreme Court of Missouri held that the county had the authority to enter into the above referred two contracts and that the same were not illegal.

You inquire whether the state is liable for the payment of any part of the amounts payable to the appraisal companies under said contracts.

Section 137.330, RSMo 1949, reads as follows:

"One-half of all the costs and expenses of the assessor in making the assessment and in the preparation of abstracts of assessment lists and tax bills shall be paid by the state. When the aggregate of such costs and expenses for each year shall have been ascertained, the county clerk or if there be a county comptroller or auditor, then the county comptroller or auditor of such county shall certify to the director of revenue the amount of said costs, one-half of which shall be paid by the state out of funds appropriated for that purpose."

Under this provision, the state is obligated to pay one-half of all the costs and expenses of the assessor in making the assessment and in the preparation of abstracts of assessment lists and tax bills.

Honorable William Scott

First, what is meant by the term "assessment"? Said term is defined in Cooley, Taxation, 4th Ed., Vol. III, Section 1044, page 2114 as follows:

"* * * An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. * * *"

The further definition is given at page 2115:

"* * * As the word is more commonly employed, an assessment consists in the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them. * * *"

The above quoted definition of the term "assessment" was quoted with approval by the Supreme Court of Missouri in the case of *State ex rel. Allen v. Kansas City, St.J. & C.B.R.Co.*, 116 Mo. 15, 23, 22 S.W. 611, and by the Kansas City Court of Appeals in the case of *Commerce Trust Co. v. Syndicate Lot Co.*, 208 Mo.App. 261, 232 SW 1055. See also the case of *Seested v. Dickey*, 318 Mo. 192, 300 SW 1088, wherein the court held that to assess property is to place a value upon it.

Chapter 137, RSMo 1949, sets forth a comprehensive scheme for the listing and valuation of property subject to taxation. Section 137.115 provides that after receiving the necessary forms, the "assessor or his deputy or deputies shall, * * *, between the first day of January and the first day of June, 1946, and each year thereafter, proceed to make a list of all real and tangible personal property in his county, town or district, and assess the same at its true value in money * * *." Section 137.120, RSMo 1949, provides that such "lists" shall contain "A list of all the real estate and its value." A complete reading of Chapter 137, RSMo 1949, clearly indicates the duty of the assessor or his duly constituted deputies to compile a list of all taxable property within the county and to place a value thereon for tax purposes. The "valuation" referred to, is the valuations of the official whose duty it is to make them. *Wy-more v. Markway*, 89 SW2d 9; *State ex rel Thompson v. Bethards*, 320 Mo. 1164, 9 SW2d 603.

In the *Hellman* case, *supra*, it was, in effect, contended that the contracts in question were invalid because they were

Honorable William Scott

attempting to delegate to the appraisal companies the powers (duties and powers to value property) enjoined by law upon the assessor. In passing upon this contention, the Supreme Court stated at page 915:

"* * * The assumption that the contracts constitute a delegation of any of the powers of the assessor is contrary to every fact and circumstance in evidence. Neither the ordinance (No. 713) nor the contracts purport to authorize or imply that any of the duties placed both by the statutes and the charter upon the assessor are to be assumed or exercised by the appraisal companies. The testimony of Mr. Rumping, introduced by plaintiff, was to the effect the assessor would make such use of the appraisals along with any other factors he deemed essential 'to determine the valuation in his own judgment'. So it is, that the whole of the evidence is to the effect that the contracts were made simply for the salutary purpose of aiding the assessor in determining the true value of, and thereby more accurately to assess, the taxable property of the county in accordance with his statutory duties. They are not invalid on that score."

Thus, it is seen that the contracts in question in no way relieve the assessor of his duty in connection with the making of the assessment or imposed this duty upon persons other than the assessor.

Bearing in mind the definition of the term "assessment" as above quoted, we are of the opinion that Section 137.330, RSMo 1949, does not require the state to pay one-half of the expenses incurred under the contracts in question. First, these expenses are not the expenses of the assessor or the duly appointed deputies and, second, the information and material furnished the county under these contracts does not constitute the "assessment" which can only be made by the assessor or his duly qualified deputies.

Further light may be shed upon the intention of the legislature in enacting Section 137.330, RSMo 1949, by reference to

Honorable William Scott

the method of paying assessors in counties of the second, third and fourth classes. Section 53.110, RSMo 1949, relates to the fees of the assessor in class two counties. Section 53.130, RSMo 1949, relates to the compensation of the assessor in class three counties and Section 53.140, RSMo 1949, relates to the compensation of the assessor in class four counties. In each of these statutory provisions, the assessors are allowed a specified fee per "list" and a specified fee per "entry" for making up the real estate assessment book, one-half of which shall be paid out of the county treasury and the other one-half to be paid out of the state treasury.

A construction such as we have placed upon Section 137.330, supra, would place St. Louis County upon the same basis as other counties throughout the state.

It would seem to be clear that the contracts entered into in St. Louis County do not relate in any manner to the preparation of abstracts of the assessment lists or the preparation of tax bills and, therefore, the state's obligation to pay one-half of the cost and expense of the assessor in preparing said abstracts and tax bills, as set out in Section 137.330, need not be considered in connection with the question at hand.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that the state is not required to pay any part of the expenses incurred under two contracts entered into by and between St. Louis County, Missouri and two appraisal companies to furnish to the county an appraisal of certain designated taxable lands and improvements thereon in said county, together with certain manuals of procedure, field record cards, land value maps, indexing cards, etc.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:hw

STATE BOARD OF TRAINING SCHOOLS: State Board of Training Schools
TRAINING SCHOOLS: may convert heating plants of
PURCHASING AGENT: institutions under its control
to use of fuel other than coal.



February 15, 1957

Mr. W. E. Sears
Director, State Board of
Training Schools
Capitol Building
Jefferson City, Missouri

Dear Mr. Sears:

This is in response to your request for opinion dated
January 21, 1957, which reads as follows:

"The two institutions under control of the State Board of Training Schools has, over the past many years, utilized coal burning boilers to furnish heat and steam throughout the campus. Within recent years, surrounding citizens have complained of a large deposit of smoke, soot, and ash which has reached the proportion of considering the advisability of utilizing gas or fuel oil for the firing of the two boilers.

"I am aware of Section 34.070 and 34.080, RSMo, Volume I, 1949, Page 218, and would like to be advised as to whether or not the use of Missouri coal is required. I appreciate the fact that nearly all large institutions burn coal but I have been advised that one or two boilers operated by the state utilize oil or gas.

"To guide our thinking in the immediate future, it would be appreciated to know specifically as to whether or not utilization of oil or gas, which are not Missouri products, could be considered so as to eradicate smoke, ash, and soot deposits."

Mr. W. E. Sears

The two sections to which you refer read as follows:

Sec. 34.070, RSMo 1949. "In making purchases, the purchasing agent shall give preference to all commodities manufactured, mined, produced or grown within the state of Missouri and to all firms, corporations or individuals doing business as Missouri firms, corporations or individuals, when quality and price are approximately the same."

Sec. 34.080, RSMo 1949. "1. That the board of trustees or other officer or officers in charge of every institution in the state of Missouri which is supported in whole or in part by public funds, and who are required to purchase coal for fuel purposes in the operation of any such institution, shall be required to purchase and use coal which is mined in the state of Missouri, if the cost of coal mined in the state of Missouri is not greater than the cost of coal mined in any other state or states, including the cost of transportation.

"2. The term 'institution' shall be construed to include all institutions supported by public funds of the state, but shall not include municipal corporations, political subdivisions or public schools."

The institutions under the control of the State Board of Training Schools are, of course, such institutions as are encompassed by Section 34.080, supra. However, neither that section nor any other section purports to limit such institutions to the purchase of coal for fuel purposes, but said section merely provides that if coal is purchased it shall be coal mined in Missouri, if the cost of coal mined in Missouri is not greater than the cost of coal mined in any other state or states, including the cost of transportation.

The charge and control of the training schools and industrial homes for boys and girls of this state is vested in the State Board of Training Schools. Section 219.020, RSMo 1949.

Mr. W. E. Sears

If, in the exercise of the Board's discretion, it is deemed advisable and desirable to convert the heating plants of the institutions under its control to the use of some fuel other than coal, it may do so, subject, of course, to the limitations of its appropriation.

CONCLUSION

It is the opinion of this office that, subject to the limitations of its appropriation, the State Board of Training Schools may convert the heating plants of the institutions under its control to the use of some fuel other than coal.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

COUNTY HIGHWAY ENGINEER:
COUNTY COURT:
SALARY:
SENATE BILL NO. 48:

Under Senate Bill No. 48, 69th General Assembly the maximum salary which a county highway engineer in a third class county may receive during the remaining term of his office is \$3,650.



September 30, 1957

Honorable Eldred Seneker
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Mr. Seneker:

Your recent request for an official opinion reads:

"Section 61.190 of Revised Statutes of Missouri, 1953, relative to Highway engineer's salary has been repealed and a new section #61.190 has been enacted in lieu thereof.

"The new section provides that in counties of the third class the highway engineer shall receive an annual salary, to be fixed by the County Court, of not to exceed \$4200 per year.

"Lawrence County Surveyor, who is a registered engineer, has been appointed by the county court as County Highway Engineer. Some members of the county court want your opinion as to whether the county highway engineer, who is also surveyor, is entitled to receive the annual salary as provided in the new section 61.190 which has recently passed. My contention is that he is, but your opinion is requested."

On September 11, 1957, you wrote to us as follows:

"In regard to my letter of August 29th, and your telephone conversation of September 10th, relative to the surveyor's salary, I will more fully explain the situation in Lawrence County, which is a third class county and ask an additional opinion.

Honorable Eldred Seneker

"Eugene Burnett was first elected surveyor in Lawrence County in the November election of 1952. In January, 1953, he was appointed county highway engineer by the county court for a term of four years. In the November 1956 election, Mr. Burnett was again elected county surveyor and in January, 1957 he was again appointed county highway engineer by the county court for a term of four years. The county court paid Mr. Burnett \$10 per day for 20 days per month for his services as county highway engineer. Under these conditions, is Mr. Burnett entitled to such yearly salary as a court may desire to pay him, not to exceed \$4200? And, if so, has the county court the authority to place Mr. Burnett on the salary plan at this time?"

All references to statutes will be to RSMo 1949, unless otherwise indicated.

Section 61.160 reads:

"The county courts of each county in this state in classes two, three and four are hereby authorized and empowered to appoint and reappoint a highway engineer within and for their respective counties at any regular meeting, for such length of time as may be deemed advisable in the judgment of the court at a compensation to be fixed by the court. The provisions of sections 61.170 to 61.310 shall apply only to counties of classes two, three and four."

Section 61.200 reads:

"The county court may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by sections 61.170 to 61.310; and when so appointed, he shall receive the compensation fixed by the county court, and such fees as are allowed by law for his services as county surveyor; provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In the event that the county highway engineer cannot properly perform all the duties of his office,

Honorable Eldred Seneker

he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court."

Numbered paragraph 2 of Section 61.190, Laws of 1953, p. 385, reads:

"2. In all counties of the third and fourth class the county highway engineer shall receive as compensation an amount fixed by the county court, for each day he shall actually serve as county highway engineer. The amount so fixed shall not exceed ten dollars per day in counties of class three nor eight dollars per day in counties of class four. All such compensation shall be payable monthly out of the county treasury. As amended Laws 1953, p. 385, § 1."

The above section was repealed and re-enacted by Senate Bill No. 48 of the 69th General Assembly, numbered paragraph 2 of which reads:

"2. In all counties of the third and fourth class the county highway engineer shall receive an annual salary, to be fixed by the county court, of not to exceed four thousand two hundred dollars per year in counties of class three, nor to exceed three thousand dollars per year in counties of class four. This compensation shall be payable monthly out of the county treasury."

In your second letter, you inform us that the county highway engineer was appointed for the second time, in January, 1957, for a four year term, and also that his previous appointment had been for a four year term.

You also state that "The County court paid Mr. Burnett \$10 per day for 20 days per month for his services as county highway engineer."

Since the county highway engineer was appointed for a "term" and since his "term" began prior to the effective date of Senate Bill No. 48, which effective date was August 29, 1957, his salary cannot be increased during his "term", since this would be violative of Section 13 of Article VII of the Missouri Constitution, which reads:

"The compensation of state, county and municipal officers shall not be increased during the

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term of office; nor shall the term of any officer be extended."

Since the salary of the county highway engineer cannot be increased during his term of office, we must determine what his "salary" was prior to the effective date of Senate Bill No. 48 so that the "salary" fixed by the county court under the provisions of that Bill will not exceed the "salary" which the county highway engineer received prior to the effective date of the Bill.

We have noted above your statement to us that prior to the effective date of the Bill the county highway engineer had been paid at the rate of \$10 per day, five days a week, for each year of his term. This would amount to a yearly sum of \$2400. The total maximum which the county highway engineer could have earned, had he worked seven days per week for each year of his term, would have been \$3,650. This figure of \$2,400 per year is a definite statement of what he actually received whether the amount be designated as salary or fees. On the other hand, as we stated, \$3,650 per year is the greatest amount which he could have possibly made. It would seem fairly clear that one or the other of these two sums must be taken as the maximum figure beyond which the county court cannot fix the salary of the county highway engineer under Senate Bill No. 48 in order that the constitutional prohibition, noted above, against increasing the salary of a county officer during his term of office not be violated.

In order to receive light upon this situation, we turn to the case of State v. Farmer, 196 S.W. 1106, a case decided by the Missouri Supreme Court en banc in 1917. The office there involved was that of circuit clerk, and from a factual point of view, it was very similar to the facts in the instant case. The situation is clearly set forth by the court at l.c. 1108 as follows:

"[3] II. Coming to the second and decisive constitutional question reserved, we have to ascertain and rule whether the act here under discussion did increase the compensation of relator and of other circuit clerks similarly situated during their terms. It is admitted that Callaway County has a population of between 25,000 and 30,000. Relator qualified as circuit clerk in his current term on the 1st day of January, 1915. When he so qualified, his compensation was fixed upon a fee basis, and he was allowed to retain the fixed sum of \$2,000 from his fees as clerk of the circuit court if he earned so much; the sum so allowed to be retained being then governed by the below statute, to wit:

'The aggregate amount of fees that any clerk under articles 2 and 3 of this chapter shall be allowed to retain for any one year's services shall not in any case exceed the amount hereinafter set out. * * * In all counties having a population of twenty-five thousand and less than thirty thousand persons, the clerks shall be permitted to retain two thousand dollars for themselves, and be allowed to pay for deputies or assistants not exceeding fifteen hundred dollars.' Laws 1913, p. 702.

"Under the act here attacked relator's compensation was commuted to the sum of \$2,000 per annum in cash, payable by the county monthly in lieu of all fees, which were thereafter payable to the county, pursuant to the below provision, to wit:

'The clerks of the circuit courts of this state shall receive for their services, annually, the following sums: In counties having a population of 7,000 persons and less than 10,000 persons, the sum of eleven hundred dollars; in counties having a population of 10,000 persons and less than 15,000 persons, the sum of twelve hundred and fifty dollars; in counties having a population of 15,000 persons and less than 20,000 persons, the sum of sixteen hundred dollars; in counties having a population of 20,000 persons and less than 25,000 persons, the sum of nineteen hundred and fifty dollars; in counties having a population of 25,000 persons and less than 30,000 persons, the sum of two thousand dollars.' Laws 1915, p. 378.

"While defendants concede that the amount of cash salary relator is entitled to receive under the provisions of the act of 1915 does not exceed, but exactly equals, the amount he was entitled to retain under the act of 1913, out of his fees collected, yet they contend that unless the fees which he actually earned and collected amount each year to a sum equal to the \$2,000 yearly cash salary, the provisions of the act of 1915 are unconstitutional, for that they in fact bring about an increase in his compensation during the currency of a given term."

At l.c. 1109, the court further stated:

Honorable Eldred Seneker

"* * * For the year 1911, the sum of \$1,056.42; for the year 1912, the sum of \$1,507.76; for the year 1913, the sum of \$1,689.04; for the year 1914, the sum of \$1,840.84. * * *."

The conclusion of the court is thus stated at l.c. 1109 et seq:

"[5,6] The act of 1915, putting circuit clerks upon a salary basis, was, it is plain, designedly enacted so that the several salaries fixed thereby and made payable monthly in cash should exactly equal the amounts fixed by statute in 1913, as the amounts which could be retained by each circuit clerk as his annual compensation out of the fees he earned. As we gather the position and contention of defendants, they concede that in all cases and counties wherein the fees actually earned by the several circuit clerks amount in any one year to the sum fixed as their salaries by the act of 1915, the act is constitutional. At least, if defendants do not concede this, the logic of their contention concedes it for them. The result of such a construction is that some circuit clerks in some counties which contain from 25,000 to 30,000 population would get the salary fixed by the act of 1915 some years, and get fees other years, and it would be impossible ever to tell what method of payment should be employed, or how much compensation the circuit clerk was to get till the end of the year. Likewise in some of the counties these officers would be paid salaries and in others still remain upon a fee basis of compensation. Such results could not have been in legislative contemplation; since two cardinal canons of construction upon the attack of unconstitutionality confront us: One of these is that we must be convinced beyond a reasonable doubt that an act is void under the Constitution before we are warranted in so declaring it. (State v. Baskowitz, 250 Mo. 82, 156 S.W. 945, Ann. Cas. 1915A, 477), the other is that where one construction of a statute would render the act absurd and unenforceable and the other the converse, we are required to adopt the latter rather than the former (State ex rel. v. Gordon, 266 Mo. 411, 181 S.W. 1016).

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"Our attention is directed toward the late case of *Folk v. St. Louis*, 250 Mo. 116, as furnishing authority for the position defendants take here. We do not think the *Folk* Case is at all persuasive. In a way that case is the antithesis of this. There an act was passed during a certain current term increasing the salary of the circuit attorney of the city of St. Louis to \$5,000 per year. The acts in force when he took office gave this official \$4,000 payable by the city, and \$350 payable by the state, a total fixed salary falling short of the amount fixed by the act attacked. It was urged that as other services were performed wherein the services performed were worth more than the difference, there was in fact no increase. We held against this contention. So that case furnishes no authority for this.

"We are constrained, therefore, to hold that the act of 1913 (Laws 1915, p. 378) fixed the basic compensation for clerks of the circuit courts, and that the amounts severally set forth in that act as the sums in fees which such clerks could each retain as their several compensations constitute the salaries from which we are to determine whether the act of 1915 increases such compensation. We have seen that the amounts are the same in counties of the class here in question, and conclude that as to the relator there has been no increase, and the act is constitutional. * * *."

From the above, it would seem plain that in the *Farmer* opinion the Missouri Supreme Court adopted the principle that the highest possible maximum of fees, rather than the amount of fees which the circuit clerk had actually received prior to putting him upon a straight salary of \$2,000 per year, was to be the measuring rod in determining whether he could receive a straight salary of \$2,000 during the remaining part of his office. We believe that the same principle would apply in the instant case of a county highway engineer. We also note that although the *Farmer* decision was handed down in 1917, it stands undisturbed or modified by subsequent appellate court opinions.

Since, as we noted above, the highest possible maximum which the county highway engineer could have earned prior to the passage of Senate Bill No. 48 was \$3,650 per year, we believe that this is the maximum at which the county court can fix his salary under the provisions of Senate Bill No. 48.

Honorable Eldred Seneker

CONCLUSION

It is the opinion of this department that under Senate Bill No. 48, 69th General Assembly, the maximum salary which a county highway engineer in a third class county may receive during the remainder of his term of his office is \$3,650 per year.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW/b1

OPEN AND CLOSED
RANGE:
TOWNSHIPS:

The portion of Flatwood Township in
Ripley County which became annexed
to Johnston Township on September
15, 1952, became open range.



April 19, 1957

Honorable Paul Simon
Representative Ripley County
Doniphan, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"On September 2, 1952, the township of Flatwood in Ripley County voted on whether to restrain livestock from running at large, the issue carried. Then a petition was sent to the county court by 25% of the voters of Flatwood Township and a large part of the township was put in Johnston Township, on Sept. 15, 1952, which has open range. I would like an opinion as to whether the part of what is now Johnston Township which was in Flatwood Township at the time of the election is now open or closed range."

Ripley County not being a township organization county, we believe the law applicable to this situation is Section 47.010, RSMo 1949, which reads:

"Each county court may divide the county into convenient townships, and as occasion may require erect new townships, subdivide townships already established, organize better township lines, and may, upon the petition in writing, of not less than twenty-five per cent of the legally qualified voters of each township affected, as such vote was cast in the last preced-

Honorable Paul Simon

ing general election for the office receiving the greatest number of votes in the township or townships affected, consolidate two or more existing townships into one township, or otherwise reduce the number of townships, or change the boundary lines thereof, as may be deemed advisable."

We assume that the consolidation of a portion of Flatwood Township with Johnston Township was effected under the above section.

The question with which we are now faced is whether that portion of Flatwood Township which became a part of Johnston Township is open or closed range, since that portion of Flatwood Township which has become a part of Johnston Township was at the time of its annexation closed range.

We would first note that the Missouri state law (Chapter 270, RSMo 1949) recognizes only two complete units so far as open and closed range is concerned. These are counties and townships.

In the case of municipalities, territory which is annexed to the municipality becomes subject to the ordinances and regulations of the municipality to which it becomes attached.

Since Johnston Township was open range and since a portion of Flatwood Township became annexed to it, and since the law only recognizes open and closed range units as being counties and entire townships, we believe that that portion of Flatwood Township which became annexed to Johnston Township became open range at the time of its annexation, because it became a part of Johnston Township.

In the case of State v. Hall, 28 S.W. 2d 1026, at 1. c. 1028, the Supreme Court of Missouri, in its opinion stated:

"The county court had created Westport township, and, as created, the General Assembly designated it as

Honorable Paul Simon

forming a part of the territorial jurisdiction, for the purpose stated, of the Kansas City division of the circuit court. The designation, as declaratory of the jurisdiction of the Kansas City division of the circuit court in mechanic's lien cases, could not remain operative, except during the legal existence of Westport township. When it ceased to exist through the exercise of the power of the county court and was attached to and became a part of Washington township, which was and had always been within the jurisdiction of the Independence division of the circuit court, the mechanic's lien cases arising in that part of Westport township, attached to and made a part of Washington township, became cognizable in the Independence division of the circuit court. To hold otherwise would be to quibble with words and defeat the purpose of the Constitution and the legislation thereunder defining the power of county courts. The power of the latter to create, re-create, or abolish is clear and complete, and there is nothing in the act of 1871, supra, either in express terms or by reasonable implication to sustain the conclusion that it was intended to limit, much less destroy, that power."

From the above, it will be seen that in a situation such as we have here when a portion of one township becomes annexed to another township such territory so annexed loses its former identity and becomes subject to the law governing the township to which it becomes annexed. In the instant case, the particular law in which we are interested is the open range law which prevails in Johnston Township and which would, accordingly, prevail in that portion of Flatwood Township which became annexed to and

Honorable Paul Simon

a part of Johnston Township.

CONCLUSION

It is the opinion of this department that the portion of Flatwood Township in Ripley County which became annexed to Johnston Township on September 15, 1952, became open range.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

FIRE PROTECTION DISTRICTS:
PROSECUTIONS:

Violations of the ordinances, rules and regulations of the Hickman Mills' Fire Protection District should be prosecuted through the office of the prosecuting attorney of Jackson County.



August 5, 1957



Honorable Austin P. Shute
Assistant Prosecuting Attorney
Jackson County
415 East 12th Street
Kansas City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"This office has had a request from the Fire Chief of the Hickman Mills, Missouri, Fire Protection District for a warrant, said warrant to be issued for the violation of an ordinance duly passed and approved by the Fire Commissioners of the said fire district.

"This district was originated and incorporated under the provisions of Chapter 321 RSMo, 49 as amended and is located within Jackson County, i.e., a class '1' county.

"Section 321.220 gives the Board the power to enact ordinances among other things and makes the violation of such ordinances a misdemeanor. This particular district has enacted ordinances suggested by the Missouri Inspection Bureau.

"This office would like to have your opinion as to whether or not warrants should issue from our office for violations of said ordinances."

Your question is whether violations of the ordinances, rules and regulations of the Hickman Mills' Fire Protection District of Jackson County are to be prosecuted through the office of the prosecuting attorney of Jackson County.

All references to statutes herein will be to RSMo 1949.

Numbered paragraph 1 of Section 321.010 reads:

Honorable Austin F. Shute

"1. A fire protection district is one to supply protection against fire by any available means. Such district must be wholly within a county of class one, must consist of contiguous tracts or parcels of property, and may include within its boundaries, or may be contiguous with any city, town or village."

Numbered paragraph 12 of Section 321.220 reads:

"(12) To adopt and amend bylaws, fire protection and fire prevention ordinances, and any other rules and regulations not in conflict with the constitution and laws of this state, necessary for the carrying on of the business, objects and affairs of the board and of the district, and refer to the proper authorities for prosecution any infraction thereof detrimental to the district. Any person violating any such ordinance, rules and regulations is hereby declared to be guilty of a misdemeanor, and upon conviction thereof shall be punished as is provided by law therefor;"

From the above, it will be seen that a violation of any ordinances, rules and regulations of the fire protection district is a misdemeanor.

Section 56.060 reads in part as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, * * *."

Section 545.010 reads in part as follows:

"All felonies shall be prosecuted by indictment or information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; and all misdemeanors shall be prosecuted by indictment or by information in the courts having jurisdiction thereof. * * *."

Section 545.240 reads in part as follows:

"Informations may be filed by the prosecuting attorney as informant during term time, or with the clerk in vacation, of the court having

Honorable Austin F. Shute

jurisdiction of the offense specified therein. All informations shall be signed by the prosecuting attorney * * *."

From the above, it will be seen that all criminal actions, which include misdemeanors, shall be prosecuted by the prosecuting attorney and that all misdemeanors shall be prosecuted by indictment or information and that all indictments or informations must be signed by the prosecuting attorney. Since violations of the ordinances, rules and regulations of the fire protection district are made misdemeanors, it follows that proceedings for their violation shall be by the prosecuting attorney of Jackson County.

CONCLUSION

It is, therefore, the opinion of this office that violations of the ordinances, rules and regulations of the Hickman Mills' Fire Protection District should be prosecuted through the office of the prosecuting attorney of Jackson County.

The foregoing opinion, which is hereby approved, was prepared by Assistant Attorney General Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

By

Robert R. Welborn
Assistant Attorney General

HPW/b1

SAVINGS AND LOAN ASSOCIATION:
INSTALLMENT NOTES:
PROVISIONS OF:
ILLEGAL WHEN:

Installment promissory note requiring borrowing member of a savings and loan association to pay one dollar per month on his savings account in addition to payments on note as additional security until principal of loan is fully satisfied, violates paragraph 3, Section 369.135, RSMo 1949.



October 23, 1957

Honorable Paul R. Sims, Supervisor
Savings and Loan Supervision
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Sims:

This department is in receipt of your recent request for our legal opinion which reads as follows:

"The document which is attached to this letter is being used by the Mississippi County Savings and Loan Association of Charleston, Missouri.

"Our examiners feel that this is in violation of Section 369.135, Paragraph 3, which reads as follows:

'Except as limited by the board of directors from time to time, a member may make payments on an account in such amounts and at such times as he may elect.'

"I would appreciate if you would study this document and give this office your opinion as to whether this is in violation of the statute."

Paragraph 3, Section 369.135, RSMo 1949, is referred to in your letter and reads as follows:

"3. Except as limited by the board of directors from time to time, a member may make payments on an account in such amounts and at such times as he may elect."

Honorable Paul R. Sims

We have not been informed the Board of Directors of the Mississippi County Savings and Loan Association has limited members in making payments on their accounts to any particular amount within a specified time, as authorized by the above-quoted section, and it will be assumed no such limitations have been imposed by the directors.

We are advised the attached form of installment note is in general use by the association and a borrower is required to execute such form of note in favor of the association, together with a deed of trust, on certain real estate described therein.

Part three of said note is involved in the opinion request, and reads as follows:

"3. And the balance, if any, to the reduction of the principal sum remaining due upon the loan.

"For value received we further promise to pay the Mississippi County Savings and Loan Association, at its office in Charleston, Missouri, the sum of One and no/100 (\$1.00) Dollars per month, into a savings account in our names in said association as additional security for the above loan, and which said monthly payment shall be made until the principal of this loan is paid in full.

"If default be made in the payment of said monthly installments for a period of three months, or if the equivalent of three month' total payments shall become in arrears, the balance of said principal sum, together with the amount advanced by and due to the association, with all arrearages and interest, shall at the option of the association, become at once due and payable. The makers, endorsers, sureties and guarantors of this note severally waive presentment for payment, notice of non-payment, protest, notice of protest, and any notice of any defenses on account of, extension of time for payment or change in the method of payment hereof.

"This obligation is secured by a deed of trust of even date herewith on certain real estate, all the terms, covenants and agreements of which are hereby made a part of this instrument." (Underscoring ours.)

From the underscoring portion of part three of the note it appears the borrower obligates himself to make the payments on account, as provided therein, until the principal is fully paid,

Honorable Paul R. Sims

and such terms require him to make payments of one dollar per month. The right to exercise his discretion in choosing to make payments, as he may desire, has been taken away. It is obvious that part three of the note is in violation of Paragraph 3, Section 369.135, supra, and is void.

CONCLUSION

Therefore, it is the opinion of this department that the provision of an installment promissory note requiring a borrowing member of a savings and loan association to pay one dollar per month on his account, in addition to the payments on the note until the principal of the loan is fully paid, as additional security for such loan, is in violation of Paragraph 3, Section 369.135, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

PNC/ld

CRIMINAL LAW:
EVIDENCE:

Electro-Matic Radar Speedmeter is a proven scientific technique for measuring the speed of motor vehicles and evidence so obtained constitutes legally admissible evidence which may support a finding of guilt in a criminal cause.



September 6, 1957

three copies

Honorable Ike Skelton, Jr.
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Mr. Skelton:

This opinion is rendered in answer to your recent inquiry reading, in part, as follows:

"Might I ask you for an opinion regarding the use of radar as a scientific means of detecting the speed of motor vehicles operating on the highways in so far as its admissibility into evidence in a court of law is concerned."

Paraphrasing the language of the Supreme Court of New Jersey in the recent case of State v. Dantonio, 18 N.J. 570, 1.c. 575, decided in 1955, it may be said that there have been no appellate court decisions in Missouri ruling the question posed in your inquiry, but "there have been several decisions in courts of other states and numerous articles in legal publications which have dealt comprehensively with the evidential problems presented by the use of radar speedmeters. See State v. Moffitt, Del. Super., 100 A. 2d 778 (Del. Super. Ct. 1953); People v. Offermann, 204 Misc. 769, 125 N.Y.S. 2d 179 (Sup. Ct. 1953); People of City of Rochester v. Torpey, 204 Misc. 1023, 128 N.Y.S. 2d 864 (Cty. Ct. 1953); People v. Katz, 205 Misc. 522, 129 N.Y.S. 2d 8 (Sp. Sess. 1954); People v. Sarver, 205 Misc. 523, 129 N.Y.S. 2d 9 (Sp. Sess. 1954); People of City of Buffalo v. Beck, 205 Misc. 757, 130 N.Y.S. 2d 354 (Sup. Ct. 1954); Baer, Radar Goes to Court,

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33 N.C.L. Rev. 355 (1955); Woodbridge, Radar in the Courts, 40 Va. L. Rev. 809 (1955); Notes, 30 N.C.L. Rev. 385 (1952); 38 Marq. L. Rev. 129 (1954); 28 Tul. L. Rev. 398 (1954); 58 Dick. L. Rev. 400 (1954); 15 Ohio St. L. J. 223 (1954); 39 Iowa L. Rev. 511 (1954); 5 Mercer L. Rev. 322 (1954); 7 Vand. L. Rev. 411 (1954); 30 Wash. L. Rev. 49 (1955); 23 Tenn. L. Rev. 784 (1955). See also Mc. Cormick, Evidence, Sec. 170 (1954); 2 Wigmore, Evidence (3rd ed. 1940), Sec. 417 (b)."

The decision of the Supreme Court of New Jersey in *State v. Dantonio*, supra, will support the conclusion to be reached in this opinion, but references will be made to cited decisions, texts and articles referred to in the preceding paragraph as we point out precepts of the law applicable to the question being considered.

The employment of a radar speedmeter to test the speed of a moving automobile on the highway involves the use of a scientific technique. To what extent will courts be authorized to consider the use of such technique as a source of proof? In McCormick, Evidence, Section 170 (1954), we find the following:

"'General scientific acceptance' is a proper condition upon the court's taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion."

State v. Dantonio, 18 N.J. 570 (1955), cited supra, involved a defendant who was charged with speeding along the New Jersey Turnpike, with such excessive speed being checked by State Troopers operating a radar speedmeter. The case commenced in the Milltown Municipal Court, was tried de novo in the Middlesex County Court and was finally appealed by the defendant to the New Jersey Supreme Court. The Supreme Court spoke as follows at 18 N.J. 570, 1.c. 575:

"The County Court expressly determined (1) that the radar equipment 'was properly set up and tested for accuracy and was functioning properly and was a correct recorder

Honorable Ike Skelton, Jr.

of speed'; (2) that the defendant 'was exceeding the speed limit of the New Jersey Turnpike and was traveling at 66 miles per hour, as charged'; and (3) that the State had 'established the guilt of the defendant beyond a reasonable doubt.' Our function on appeal ordinarily is not to make new factual findings but simply to decide whether there was adequate evidence before the County Court to justify its finding of guilt."

In its opinion in *State v. Dantonio*, supra, the Supreme Court of New Jersey suggested that "through the years our courts have properly been called upon to recognize scientific discoveries and pass upon their effects in judicial proceedings." The Court alluded to the evolution of the law of evidence which finally approved the use of fingerprint evidence and quoted approvingly from *State v. Cerciello*, 86 N.J.L. 309, 314 (E. & A. 1914), the following language found at 18 N.J. 570, l.c. 577:

"In principle its admission as legal evidence is based upon the theory that the evolution in practical affairs of life, whereby the progressive and scientific tendencies of the age are manifest in every other department of human endeavor, cannot be ignored in legal procedure, but that the law, in its efforts to enforce justice by demonstrating a fact in issue, will allow evidence of those scientific processes which are the work of educated and skillful men in their various departments, and apply them to the demonstration of a fact, leaving the weight and effect to be given to the effort and its results entirely to the consideration of the jury. *Stephen Dig. Ev. 267; 2 Best on Ev. 514.*"

Treating of the widespread knowledge of the use of radar the New Jersey Supreme Court spoke in its own language in these

Honorable Ike Skelton, Jr.

words found at 18 N.J. 570, 1.c. 578:

"Since World War II members of the public have become generally aware of the widespread use of radar methods in detecting the presence of objects and their distance and speed; and while they may not fully understand their intricacies they do not question their general accuracy and effectiveness. Dr. Kopper has pointed out that, in contrast to other radar methods, the method actually used in the speedometer is rather simple and has been adopted by many law enforcement bodies; a recent tabulation indicates that speedometers are being used in 43 states by almost 500 police departments. See Radar Traffic Controls, 23 Tenn. L. Rev. 784 (1955). The writings on the subject assert that when properly operated they accurately record speed (within reasonable tolerances of perhaps two or three miles per hour) and nothing to the contrary has been brought to our attention; under the circumstances it would seem that evidence of radar speedometer readings should be received in evidence upon a showing that the speedometer was properly set up and tested by the police officers without any need for independent expert testimony by electrical engineers as to its general nature and trustworthiness."

In its opinion the Supreme Court of New Jersey quoted approvingly from Woodbridge, Radar in the Courts, 40 Va. L. Rev. 809, and such quotation is extracted from the opinion in State v. Dantonio, 18 N.J. 570, 1.c. 578, 579, as follows:

"Under the Uniform Rules of Evidence, already approved by the American Bar Association at its 1953 meeting, judicial notice "shall be taken without request by a party * * * of such specific facts and propositions of generalized knowledge

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as are so universally known that they cannot reasonably be the subject of dispute." Radar speed meters are now in this category. Why should the time of experts be wasted and the expenses of litigation be increased by compelling such men to appear in court after court telling the same truths over and over? While it is agreed that every reasonable doubt about the accuracy of new developments should promptly be resolved against them in the absence of expert evidence, there is no longer any such doubt concerning radar. Rather, the applicable maxim should now be, "What the world generally knows a court of justice may be assumed to know." "

In concluding their remarks on the operation of the radar speedmeter in *State v. Dantonio*, supra, the Court spoke as follows at 18 N.J. 570, l.c. 579, 580:

"In the instant matter the State Troopers were sufficiently qualified to set up their radar speedmeter and the evidence indicated that they duly tested it before its use. They had been operating it for many months and could readily observe whether it was in regular working order. They had no difficulty in reading the calibrated needle and the permanent graph and it was no more necessary that they actually understand the intricate electrical workings of the device than that they understand how their car speedometers work. They tested the speedmeter to see that it registered 'zero' when nothing was in range and they pushed the designated switch to 'test' position to observe that the needle reacted properly; then they compared radar readings with speedometer readings on their cars which were driven within range. In one instance these readings were identical and in the other they favored the car; it may be noted, as Dr. Kopper testified below, that all types of error actually

Honorable Ike Skelton, Jr.

suggested during the trial would result in lower radar readings thus favoring the car. Before this court the defendant has also suggested the possibility of error but has pointed to no evidence of error which would favor him. In any event, the possibility of error would not wholly deny the admissibility of radar evidence but would simply affect its weight; the State concedes that the readings were not conclusive but merely constituted admissible evidence to be weighed by the trier of facts along with all other evidence which was logically relevant. (Underscoring supplied.)

The Supreme Court of Appeals of Virginia in 1956 decided the case of Dooley v. Commonwealth of Virginia, 198 Va. 32, 92 S.E. 2d 348, cited with approval State v. Dantonio, supra, and spoke as follows at 92 S.E. 2d 348, l.c. 350:

"That there is a natural and rational evidentiary relation existing between the results of a speed checked by radio-micro waves and the speed of a motor vehicle checked by them can hardly be denied. For many years the public has become generally aware of the widespread use of radiomicro waves or other electrical devices in detecting the speed of motor vehicles or other moving objects; and while the intricacies of such devices may not be fully understood their general accuracy and effectiveness are not seriously questioned. State v. Dantonio, 18 N.J. 570, 115 A. 2d 35, 39, 40."

The Court of Special Sessions in New York in 1954 decided the case of People on Inf. of Laibowitz v. Katz, 129 N.Y.S. 2d 8, l.c. 9, and spoke as follows:

"The Electromatic Speedometer herein described is a scientifically reliable device which if properly operated and properly functioning falls in the

Honorable Ike Skelton, Jr.

category of recognized instruments
used to determine the speed of
moving vehicles."

CONCLUSION

It is the opinion of this office that the use of an Electro-Matic Radar Speedmeter, when properly set up and tested by its operators, constitutes the employment of a proven scientific technique for measuring the speed of motor vehicles, and evidence so obtained constitutes legally admissible evidence which may readily support a finding of guilt in a criminal cause.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw

SCHOOLS: December 25, 1956, counted as a day in
session for the purpose of apportioning
HOLIDAYS: state aid to schools.



September 30, 1957

Honorable Vance O. Smithpeter
Prosecuting Attorney
Carroll County
Carrollton, Missouri

Dear Mr. Smithpeter:

This is in response to your request for an opinion dated
August 15, 1957, which reads, in part, as follows:

"In regard to the audits of attendance
records of the public school districts
in Carroll, as provided in Paragraph 1,
Section 165.115 (L 1955 S.B. 107), I am
requesting your opinion in regard to
Paragraph 3 of the above section.

"Section 161.021 (L 1955 S.B. 3) Para-
graph (1) provides for including in the
number of days that school is in session
the legal holidays as specified in Section
163.020 R.S. Mo. 1949. The number of days
school is in session is used in determining
the 'average daily attendance' referred to
in said Paragraph (1), Section 161.021, and
the 'average daily attendance' in turn is
used to determine the apportionment of State
Aid as provided in Section 161.031, Para-
graphs 1 and 3 (L 1955 S.B. 3).

"My specific question is, does Christmas
Day, December 25, 1956, count as a day in
session for the above computations, school
having been dismissed for Christmas vacation
on Friday, December 21, and not resumed until
Monday, December 31, or thereafter?"

Honorable Vance O. Smithpeter

Section 161.021(1), RSMo, Cum. Supp. 1955, to which you refer, reads as follows:

"(1) 'Average daily attendance' means the result obtained by dividing the total number of days attended of pupils in grades one through twelve inclusive and between the ages of six and twenty, by the actual number of days that the school was in session including legal school holidays and legally authorized teachers' meetings. The days' attendance on legal holidays and on days when the school is dismissed by order of the board to permit teachers to attend teachers' meetings shall be determined by counting as present each pupil who was present on the last day the school was in session before such intermission."

That section standing alone is clear and free from ambiguity. The only thing which could possibly give rise to your question is the fact that Section 163.020, RSMo 1949, in defining a "school week", provides, in part, that:

" * * * the school week shall consist of five school days, except when Thanksgiving day, December twenty-fifth, February twenty-second or July fourth shall fall upon a regular school day, then the four remaining school days, if taught, shall constitute a legal school week; * * *."

In 1956, December 25 was on a Tuesday, and under your factual situation school was not in session on the other days of the week so that under Section 163.020, supra, Christmas week could not be counted as a legal school week.

However, the apportionment of state aid is not based upon school weeks, but, rather, upon average daily attendance as defined in Section 161.021(1), supra. Consequently, Section 163.020, supra, has no bearing upon the question except insofar as it specifies the days recognized as legal school holidays.

Under the facts of this request and following the provisions of Section 161.020(1), supra, December 25, 1956, is counted as a

Honorable Vance O. Smithpeter

day in session for the purpose of apportionment of state aid and the day's attendance on that day is determined by counting as present each pupil who was present on the last day school was in session, i.e., Friday, December 21, 1956.

CONCLUSION

It is the opinion of this office that December 25, 1956, is to be counted as a day in session for the purpose of apportioning state aid to schools.

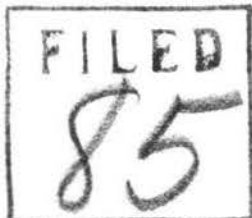
The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Very truly yours,

JOHN M. DALTON
Attorney General

JWI:hw;ml

CHILD CUSTODY:
JUVENILE COURT:



Section 453.110 RSMo 1949, provides for transfer of custody of child from person, agency, organization or institution having legal custody of said child to any parent, agency or organization or institution for care in a family home without a court order provided the person, agency, organization or institution having legal custody of the child shall retain the right to supervise the care of said child and to resume custody of said child.

August 27, 1957

Honorable John S. Stevens
Assistant Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

This is in answer to your opinion request to this office dated July 31, 1957, which reads as follows:

"Is there a violation of Sec. 453.110 R.S. Mo. 1949, when a child, properly in the custody of a licensed child welfare agency, is placed by that agency in the home of prospective adopting parents without first obtaining a Court Order for change of custody."

Section 453.110 RSMo 1949, to which you refer, reads as follows:

"1. No person, agency, organization or institution shall surrender custody of a minor child, or transfer the custody of such a child to another, and no person, agency, or organization or institution shall take possession or charge of a minor child so transferred, without first having filed a petition before the circuit court sitting as a juvenile court of the county where the child may be, praying that such surrender or transfer may be made, and having obtained such an order from such court approving or ordering transfer of custody.

"2. This section shall not be construed to prohibit the placing of a child in a family home for care by any parent, agency, or organization or institution, if the right to supervise the care of the child and to resume custody thereof is retained. If any such

Honorable John S. Stevens

surrender or transfer is made without first obtaining such an order, such court shall have the right on petition of any public official or interested person, agency, organization, or institution, to inquire into the facts and to make such order as to the custody of such child as may be for the best interests thereof.

"3. Any person violating the terms of this section shall be guilty of a misdemeanor."

In Volume 4, Journal of the Missouri Bar, September, 1948, at pages 228 to 231, there appears an article entitled "The New Adoption Act" written by Harold S. Cook and Fred A. Eppenberger of the St. Louis Bar.

In discussing the second paragraph of Section 453.110, supra, which at that time was Section 9616, RSMo 1939, they state at page 231:

"This section which prohibits surrender or transfer of custody of a minor without an order of the Juvenile Court, has been broadened to include within its provisions, institutions as well as individuals. The second sentence has been added in order to make it clear that the section is not intended to apply to the placement of children in family homes for care if the right to supervise the care and to resume custody is retained. The third sentence gives the Court broad powers to determine questions as to the future custody of the child in case the section is violated."

Under paragraph 2 of Section 453.110, supra, and the interpretation placed thereon by the above cited article, it would seem that a child can be placed in a family home for care by any parent, agency or organization or institution without an order from the court so long as the person, agency, organization, or institution having legal custody of the child shall retain the right to supervise the care of the child and to resume custody of the child.

Honorable John S. Stevens

CONCLUSION

It is the opinion of this office that Section 453.110, RSMo 1949, is not violated when a child, properly in the custody of a licensed child welfare agency, is placed by that agency in the home of prospective adopting parents without first obtaining a court order for change of custody provided the licensed child welfare agency having legal custody of the child retains the right to supervise the care of the child and to resume custody of said child.

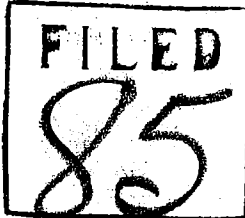
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Richard W. Dahms.

Yours very truly,

John M. Dalton
Attorney General

RWD:gm:mw

EXECUTIONS: After receiving an order of execution on real property,
SHERIFFS: a sheriff should proceed with the levy and execution. Further, unless otherwise directed, every execution issued from any court of record shall be returnable at the next succeeding term.



September 12, 1957

Honorable John S. Stevens
Assistant Prosecuting Attorney
St. Louis County
Courthouse
Clayton, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Question has arisen in this office concerning sale after a levy by an officer of the Court. We would greatly appreciate your opinion in the following situation:

When the Sheriff is directed by an execution to levy and levy is made on real property, is it necessary for the Sheriff to await orders of the plaintiff's attorney, or should the sheriff proceed to advertise and sell the property levied upon. If he should proceed, within what period of time does he have power to do this."

In regard to your first question, we find nothing in the law which would require the sheriff to await orders of the plaintiff's attorney in this matter. Section 513.020, RSMo 1949, reads:

"Executions may issue upon a judgment at any time within ten years after the rendition of such judgment."

Section 513.025, RSMo 1949, reads:

"Such execution shall be a fiery facias against the goods, chattels and real estate of the party against whom the judgment, order or decree is rendered, and shall be to the following effect:

Honorable John S. Stevens

The state of Missouri, to the sheriff of
the county of _____.

Whereas, A B, on the _____ day of _____, in
the year of our Lord nineteen hundred and
_____, at our court, hath recovered against
C D, the sum of _____, for debt (or damages,
as the case may be), and also for the sum of
_____ which to the said A B were adjudged for
his damages, as well as by reason of detain-
ing the said debt, as for his cost in that
suit expended: These are, therefore, to
command you, that of the goods and chattels
and real estate of the said C D, you cause
to be made the debt, damages and costs (or
damages and costs), and that you have the
same before the judge of said court, on the
_____ day of _____, to satisfy the debt, dam-
ages and costs aforesaid (or damages alone
and costs), and that you certify how you
execute this writ. Witness: E F, clerk of
the said court, at _____, this _____ day of
_____ in the year _____. E F, clerk."

From the above, it would plainly appear that the sheriff is
to proceed forthwith after receiving the directorate provided for
in Section 513.025, RSMo 1949.

Section 513.005, RSMo 1949, reads:

"When real estate shall be taken in execution
by an officer, it shall be his duty to expose
the same to sale at the courthouse door, on
some day during the term of the circuit court
of the county where the same is situated, hav-
ing previously given twenty days' notice of
the time and place of sale, and what real
estate is to be sold and where situated, by
advertisement in some newspaper printed in the
county which may be designated by the plain-
tiff or his attorney of record, if there be
one regularly published, weekly or daily, and
if not, by at least six printed or written
handbills, signed by such sheriff, and put up
in public places in different parts of the
county; and the printer's fee for such adver-
tisement shall be taxed and paid as other
costs; provided, that in all cities in this
state now or hereafter containing one hundred
thousand inhabitants or more, such sales shall

Honorable John S. Stevens

be on the floor of the real estate exchange
or at the courthouse door, as may be announced
in said advertisement."

From the above, it appears that the plaintiff, or his attorney, may direct the newspaper in which publication shall be made. However, in view of the fact that the section does not vest in the plaintiff or his attorney any other authority in connection with the matter we take it to have been the intention of the Legislature that no additional authority should reside in them, and that it is not necessary for the sheriff to await the orders of the plaintiff or plaintiff's attorney before proceeding to advertise and to sell the property levied on.

You also inquire whether, if the sheriff should proceed, within what period of time does he have to do so.

Section 513.030, RSMo 1949, reads:

"Every execution issued from any court of record shall be made returnable at the next succeeding term, unless the plaintiff, or person to whose use the suit was brought, shall otherwise direct; then it shall be the duty of the clerk issuing the same to make it returnable to the second succeeding term."

From the above, we believe that so long as the sheriff makes the return as above provided that he has fulfilled his duty in this respect.

CONCLUSION

It is the opinion of this department that after receiving an order of execution on real property, a sheriff should proceed with the levy and execution. It is the further opinion of this department that unless otherwise directed, every execution issued from any court of record shall be returnable at the next succeeding term.

The foregoing opinion, which is hereby approved, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

INSURANCE: Sec. 379.355 RSMo 1949 not violated when cost of municipal franchise tax levied by City of Springfield, Missouri against fire insurance companies has been added to fire insurance rates published for such city by Missouri Inspection Bureau pursuant to Missouri's Rating Act, Secs. 379.315 to 379.415 RSMo 1949.



January 9, 1957

Honorable Lyndon Sturgis
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

This opinion is rendered in reply to your request reading as follows:

"I would appreciate a legal opinion from your office on the following situation concerning the application of Section 379.355, R. S. Mo. 1949. The first question is as follows:

Does an increase in rate by the Missouri Inspection Bureau applicable to premiums realized in the City of Springfield, Missouri, for the reason that the City of Springfield has charged the companies realizing such premiums a municipal license fee, violate Section 379.355 of the Revised Statutes of Missouri, 1949?

"The second question is:

If such action by the Missouri Inspection Bureau and its member companies does not violate the above cited section, is it a violation of said section for multiple line companies who are charged only one municipal license fee for writing all kinds of insurance to pass the entire amount of the municipal license fee charged onto those customers from which they realize a fire insurance premium?

Honorable Lyndon Sturgis

"You may recall that several months ago there was some controversy between the City Manager and members of the Council of the City of Springfield and Mr. Lawrence Leggett, Superintendent of the Division of Insurance concerning such rate increase. It was my understanding that such controversy had been settled. However, the question as to the interpretation of this State Statute has not been resolved and your opinion on this matter would be very much appreciated."

The first question you have posed was answered directly on January 5, 1924 in a letter directed to Honorable Ben C. Hyde, Superintendent of Insurance, by the Attorney General of Missouri, Honorable Jesse W. Barrett. In the course of his letter the Attorney General spoke as follows:

"* * * Where rates are regulated by the State, as in this case, and based upon the cost of doing business, it is folly to view a tax upon the company as anything other than a tax and burden upon the people themselves and the sole question here therefore becomes that of whether the special tax levied in certain towns and cities shall be paid by the citizens of the whole or by the citizens of those municipalities. I believe that all ambiguities should be resolved in favor of the best public policy and in this instance I think the public interest can best be served by having the extra cost of doing business assessed to the citizens of those municipalities where that cost is incurred. You are advised, therefore, that insurance companies doing business in municipalities which levy a tax upon the companies therein may there charge higher rates on account of said tax without violating the provisions of Sections 6276 and 6278, R.S. 1919."

Honorable Lyndon Sturgis

Sections 6276 and 6278 R.S. Mo. 1919, referred to in the preceding quotation, are found unchanged today at Sections 379.350 and 379.355 RSMo 1949, and we here set out the statutes in full:

(Section 379.350, RSMo 1949)

"No company or other insurer or agents shall directly or indirectly, by any special rate, tariff, drawback, rebate, concession, device or subterfuge, charge, demand, collect or receive from any person, persons or corporation any compensation and premium different from the rate or premium properly applicable to the property so rated, as indicated by its public rating record, and no company or other insurer shall discriminate unfairly between risks of essentially the same hazard and substantially the same degree of protection."

(Section 379.355, RSMo 1949)

"No fire insurance company or other insurer, nor any rating bureau shall fix and charge any rate for fire insurance upon property in this state which discriminates unfairly between risks in the application of like charges and credits, or which discriminates unfairly between risks of essentially the same hazards and having substantially the same degree of protection against fire."

The conclusion to be made and stated hereafter in relation to the first question posed in your request fully supports the advice given in the Attorney General's letter of January 5, 1924, quoted above. However, it is considered expedient at this time to cite additional reasons for the conclusion to be reached in this opinion.

Missouri's fire insurance Rating Act is found at Sections 379.315 to 379.415 RSMo 1949. For accepted basic procedure under the Rating Act we quote the following from State ex Inf. Taylor v. American Insurance Company, et al. 200 S.W. (2d) 1, 355 Mo. 1053, 1.c. 1078:

Honorable Lyndon Sturgis

"We hold that in establishing rates the Missouri Inspection Bureau and the Superintendent of Insurance have followed the correct method, as prescribed by our statute by using the aggregate experience of all companies and not the individual experience of each company as a basis. We need not speculate upon the chaotic condition that would result if rates were to be based on the experience of each individual company. That is self-evident."

The discrimination prohibited by Section 379.355 RSMo 1949, supra, must produce one of the following fact situations in order to produce a violation of the statute:

(a) There must be a discrimination in the application of like charges and credits,

or

(b) There must be a discrimination between risks of essentially the same hazards and having substantially the same degree of protection against fire.

In order to refute any contention that published rates for fire insurance coverage in Missouri must be uniform, in amount, throughout different localities in the State, we quote the following from State ex rel. Waterworth v. Clark, 275 Mo. 95, l.c. 105:

"It is idle to say that the hazards of fire and the protection against the same are equal in St. Louis and Clinton, or in Kansas City and Cape Girardeau, or in St. Joseph and Cedar City."

If uniformity in application of like charges and credits, as well as uniformity in classification of risks, made mandatory by Section 379.355 RSMo 1949, supra, are to be maintained by the rating bureau when publishing rates for the companies, it reasonably follows that such uniformity in classification of risks, and fixing of rates applicable thereto, must involve only those factors which can bear upon the situation uniformly and be anticipated at the time the rates are published. Municipal

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franchise taxes bear no relationship to insurance coverage, are conspicuous by their lack of uniformity in amount, and are not exacted according to any fixed pattern throughout the State. To permit consideration of a municipal franchise tax as a basic factor in arriving at published rates for fire insurance coverage in the light of our Rating Act would foster discrimination at the expense of policyholders whose uniform interests were sought to be protected by the Rating Act, and considering such a factor would create an exception to the rule where none now exists in relation to that factor.

Investigation discloses that the increase in fire insurance rates brought about by passage of various municipal franchise tax ordinances throughout the State has not altered the general basis schedule embodying basis rates, charges, terms, conditions, permits and standards used by the rating bureau in publishing rates for insurance coverage, but the action of the rating bureau, on behalf of its subscribers, in directing that such municipal franchise tax be added to the published rate of coverage for the municipality levying the tax can be considered as an aid to the municipality in the collection of its franchise tax rather than a discrimination against the municipality in applying uniform rates for fire insurance coverage. It is concluded that Section 379.355 RSMo 1949 has not been violated when the cost of a municipal franchise tax against fire insurance companies, levied by the City of Springfield, Missouri, has been added to the fire insurance rates published for such City by the Missouri Inspection Bureau pursuant to Missouri's Rating Act found at Sections 379.315 to 379.415 RSMo 1949.

An answer to your second question must be withheld until additional facts are submitted disclosing (1) the wording of the ordinance in question, and (2) the manner in which such multiple line companies are passing on to the policyholders the license fee. In submitting this information it should be kept in mind that premium rates for fire, lightning, hail and windstorm, are broken down in schedules from extended coverage and miscellaneous casualty risk rates.

CONCLUSION

It is the opinion of this department that Section 379.355 RSMo 1949 has not been violated when the cost of a municipal franchise tax against fire insurance companies, levied by the

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City of Springfield, Missouri, has been added to the fire insurance rates published for such City by the Missouri Inspection Bureau pursuant to Missouri's Rating Act found at Sections 379.315 to 379.415 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:hw

MAGISTRATE COURTS:
STATUTORY CONSTRUCTION:

Senate Bill 189 abolished the office of chief clerk of the magistrate courts of Greene County, Missouri, and created a vacancy to be filled by the Governor.



September 20, 1957

Honorable Lyndon Sturgis
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion construing Senate Bill 189, passed by the 69th General Assembly of the State of Missouri, and which became effective August 29, 1957.

This act specifically repealed Section 483.495, RSMo Cum. Supp. 1955, relating to organization of magistrate courts and the chief clerk and deputies of said courts, and enacted in lieu thereof a new section relating to the same subject matter and known by the same number. The pertinent part of said statutes reads:

"Section 483.495- -And there shall be a chief clerk of the magistrate court who shall be appointed by the various magistrates jointly, and who shall serve at the pleasure of the magistrates and until his successor is duly appointed and qualified. If within thirty days after this section becomes effective the magistrates are unable to agree upon the person to be appointed the judges of the circuit court of the county shall appoint such chief clerk."

"Senate Bill 189- - -

* * * * *

"2. There shall be a chief clerk of the magistrate court who shall be elected by the qualified electors of the county at the general election of the year 1958, and every four years thereafter, and who shall serve until his successor is duly elected and qualified."

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The principal difference between Section 483.495, RSMo Cum. Supp. 1955, and Senate Bill 189 is that, under the former, the clerk was appointed by the magistrates jointly to serve at their pleasure and until his successor is duly appointed and qualified. In the latter it states there shall be a chief clerk who shall be elected by the qualified electors of the county at the General Election in 1958, and every four years thereafter, and shall serve until his successor is duly elected and qualified. The bill further increases the compensation of the chief clerk and deputies and also applies to different size counties, however, Greene County came within the former classification under the old statute as well as under the new act.

The term repeal is synonymous with abolish, rescind and annul, and means the abrogation or annulling of a previously existing law by the enactment of a subsequent statute. Dawson vs. Tobin, 24 N.W.2d. 739, 746, 747, 74 N.D. 713; City of Owensboro vs. Board of Trustees, City of Owensboro Employment Pension Fund, 190 S.W. 2d. 1005, 1008, 30 Ky. 113.

Senate Bill 189 for the most part follows the former law with regard to organization of certain magistrate courts, creation of the office of chief clerk, and appointment of deputy clerks. The question might be raised that it is, in fact, an amendment and not an outright repeal of the former law. However, the Supreme Court en banc has held to the contrary. In State v. Moore, 99 S.W. 2d. 17, 1.c. 19, the Supreme Court said:

"* * * *The caption of the act as it appears in Laws Mo. 1933, p. 360, reads as follows:

"Recorder of Deeds: Relating to Office, Term, Bond and Election of Recorder of Deeds.

"An Act to repeal Sections 11526, 11528, 11529, 11533, 11534 11535, 11538, 11539, 11540 and 11541 of the Revised Statutes of Missouri for the year 1929, the same being found on pages 3112, 3113, 3114 of Volume 2 of the Revised Statutes of Missouri for the year 1929, and being a part of chapter 74, article 1, entitled "Recorders of Deeds" and relating to "Recorders of Deeds," and to enact in lieu thereof seven new sections, pertaining to the same subject to be know as Sections 11526, 11528, 11529, 11534, 11535, 11538, and 11541."

* * * * *

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"[4] Another point made by appellant if we properly interpret his brief, is this: Section 11526, R.S. Mo. 1929 (Mo. St. Ann. § 11526 p. 6696), provided 'there shall be an office of recorder in each county in the state, to be styled "the office of the recorder of deeds."' The repealing section in the 1933 act is identically the same, except that after the word 'state' there is inserted a limiting phrase, 'containing 20,000 inhabitants or more.' Mo. St. Ann. § 11526, p. 6696. Appellant says this is merely an amendment of the former section, and not a repeal of it as the title of the bill declares; and he asserts that the title of the act is for that reason misleading. This contention, if we are correct in thinking appellant makes it, does not call for extended discussion. The repeal of a law means its complete abrogation by the enactment of a subsequent statute. 59 C.J. §498, p.899; St. Louis v. Kellman 235 Mo. 687, 695, 139 S.W. 443, 445. Whereas the amendment of a statute means an alteration in the law already existing, leaving some part of the original still standing. 59 C.J. §421, p. 850; State ex rel. Gamble v. Hubbard, 148 Ala. 391, 394, 41 So. 903, 905; Aldridge v. Commonwealth, 192 Ky. 215, 218, 232 S.W. 619, 620. In the present instance there was an express repeal of the former section."

There can be no question that the Legislature may abolish any office not provided by the Constitution and an incumbent has no legal ground to complain. State ex inf. Barrett ex rel. Bradshaw v. Hedrick, 294 Mo. 21, 241 S.W. 402; State ex rel. Tolerton v. Gordon, 236 Mo. 142, 139 S.W. 2d. 403.

In view of the fact this office of chief clerk of the magistrate court was created by an act of the Legislature to serve only at the pleasure of the magistrates, under the foregoing decisions the Legislature could repeal the law creating said office which, in effect, abolishes said office, and the present incumbent, after the effective date of Senate Bill 189, August 29, 1957, no longer can claim title to such office. There is no provision in Senate Bill 189, supra, that in any manner would retain the present incumbent in said office. Said Bill does create the office of chief clerk of the magistrate court in such counties, and contains a provision for procedure for filling said office at the General Election in November, 1958. However, said Bill failed to adopt any procedure for filling said office during the interim of August 29, to the General Election in November, 1958.

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Therefore, we must conclude that the office of chief clerk of the magistrate courts in such counties as Greene County, was created by Senate Bill 189, as of August 29, 1957, and that a vacancy exists in said office until the General Election to be held in November, 1958, at which time such official must be elected.

It was held in State ex inf. Taylor v. Kirbuz, 208 S.W. 2d. 285, that where the Legislature creates an office with no restrictions for filling same a vacancy exists ipso facto. In so holding, the court said at l.c. 290:

"* * * *The bill presently creates the new office, and consolidates the functions of the two former offices. Witness this language, 'In all counties of class one in this state there is hereby created the office of county highway engineer and surveyor, to be known and designated as highway engineer,' etc. In State ex rel. Brown v. McMillan, 108 Mo. 153, 159, 18 S.W. 784, 785, it was said: 'We think that both authority and the spirit of our institutions favor the view that when an office is created, and no restrictions for filling the vacancy are imposed, a vacancy arises ipso facto.'* * * *"

Section 483.020, RSMo 1949, provides as follows:

"When any vacancy shall occur in the office of any clerk of a court of record so elected, by death, resignation, removal, refusal to act or otherwise, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office, who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed."

Clerks of magistrate courts are clerks of courts of record.
Section 476.010, RSMo 1949.

We deem it unnecessary to determine whether the vacancy in the office of clerk of the magistrate court would be filled under such section however, because Section 4, Article IV of the Constitution of the State of Missouri provides for the filling of all vacancies in public offices not otherwise provided for by law by the Governor. The Governor, therefore, makes the appointment to fill the vacancy in this case whether it is one to be filled under the provisions of Section 483.020, supra, or under Section 4, Article IV, Constitution of Missouri.

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In view of the foregoing, we conclude that the Governor of the State of Missouri is vested with authority to make this appointment and said appointee shall serve until the next General Election in November, 1958.

CONCLUSION

It is, therefore, the opinion of this Department that Section 483.495, RSMo Cum. Supp. 1955, was repealed by Senate Bill 189, passed by the 69th General Assembly of the State of Missouri, which Bill became effective on August 29, 1957. The repeal of the above section abolished the office of chief clerk of the magistrate courts for such counties as Greene and created such an office as of the same date. This created a vacancy in said office until the General Election in November, 1958, which vacancy shall be filled by appointment of the Governor to serve until the General Election in November, 1958.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH:mw

ANNEXATION:
ELECTIONS:
CITIES:
ELECTION COMMISSIONERS:
KANSAS CITY:
CONSTITUTIONAL CHARTER CITIES:

Kansas City Board of Election Commissioners may not accept registration records of the Jackson County Board of Election Commissioners applicable to persons within an area annexed to Kansas City; but electors must re-register as provided in Section 82.100, RSMo. 1949.



January 30, 1957

Honorable William E. Tipton
Attorney for the Board
Board of Election Commissioners
1331 Locust Street
Kansas City 6, Missouri

Dear Mr. Tipton:

This is in answer to your request for an official opinion from this office which reads as follows:

"On January 1, 1957, an area to the east of the city limits of Kansas City, Missouri will be annexed to said city. In making preparation for this, a question has arisen in regard to registration of voters in an annexed area.

"Jackson County, in which this area is located, has permanent registration of voters under the Jackson County Board of Election Commissioners. On the effective date of the annexation, January 1, 1957, this area will be under the jurisdiction of the Kansas City Board of Election Commissioners, as far as registration and elections are concerned.

"The Board has directed me to request an opinion from you as to whether or not we may accept the registration records of the Jackson County Board, of the persons already registered in the area concerned, or whether we should require these people to re-register in the city."

Chapter 117, RSMo. 1949, and Mo. Cum. Supp. 1955, provides for registration and conduct of elections in Kansas City. Sections 113.490 through 113.870, Mo. Cum. Supp. 1955, provide for registration and conduct of elections within Jackson County outside the limits of Kansas City. In answering this opinion, we shall not quote the long sections involved herein, but merely interpret the meaning of said sections.

Honorable William E. Tipton

Section 117.300, Mo. Cum. Supp. 1955, provides, among other things, that the registration of voters within Kansas City shall be regulated by the Kansas City Board of Election Commissioners (hereinafter referred to as the Board); and it sets out in detail what is required of and by each applicant for registration. The import of this section is that no resident of Kansas City shall be entitled to vote within said city until he shall appear personally before the Board and register.

Further, what the Board can do and cannot do is set out in detail in Chapter 117, supra. Nowhere does said chapter expressly authorize or by implication authorize the Board to accept the registration records of the Jackson County Board of Election Commissioners of those persons who are within territory annexed by the City of Kansas City, but who were formerly within said county. But rather than base the conclusion of this opinion upon an interpretation of the statutes mentioned above, we call your attention to Section 82.100, RSMo. 1949, which applies to Kansas City, a constitutional charter city, and which answers your question in unequivocal terms. That section reads as follows:

"Whenever, by extension of its territorial limits as aforesaid, new territory is annexed to such city, the lawmaking authorities thereof shall, by ordinance, organize the same into a new ward or wards, or attach the same to some existing ward or wards, long enough before the next ensuing general city election to enable electors in such annexed territory to register, and all other proper steps to be taken according to law, so that the electors of such annexed territory may have full opportunity to register and vote at such election. Actual residents of any territory at the time of the annexation thereof, as aforesaid shall, if otherwise qualified, be qualified electors of such city, and be eligible to any office therein at the next general city election following such annexation."

This section provides that where territory is annexed to such city, the city is directed to see that registration is completed in time to enable the electors in the annexed territory to vote at the next ensuing city election. The last sentence of this section provides that actual residents of the territory at the time of annexation, if otherwise qualified (and this refers back to their being registered), shall be entitled to vote at the next general city election following the annexation. We hold that this would apply to a special election as well as a general election.

Honorable William E. Tipton

CONCLUSION

It is therefore the opinion of this office that the Kansas City Board of Election Commissioners may not accept the registration records of the Jackson County Board of Election Commissioners of persons within an area annexed by Kansas City; but the Board must require the voters of the annexed area to re-register as provided in Section 82.100, RSMo. 1949, and in the manner they are directed in Chapter 117, supra.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, George E. Schaaf.

Yours very truly,

JOHN M. DALTON
Attorney General

GES/b1

CORPORATIONS: Minnesota corporation has no officer, agent
FOREIGN: or employee in Missouri soliciting business.
WHEN DOING BUSINESS It solicits business by advertising matter in
IN MISSOURI: magazines, newspapers, over radio and tele-
vision, and by U.S. mail sent from its
Minnesota plant. Orders for goods are accepted
at plant but filled and shipments to customers
are from stock kept in warehouse in Missouri, by Missouri warehouse cor-
poration. Latter corporation has no relationship with former except by
contract. Former furnishes directions to latter for filling orders and
shipping goods to customers, and shipments are not in interstate com-
merce, but are intrastate, and Minnesota corporation is doing business
in Missouri within the meaning of Chapter 351, RSMo 1949, and must
procure certificate from secretary of state authorizing it to do busi-
ness in Missouri as required by Sec. 351.570, RSMo 1949.

February 15, 1957

Honorable Walter H. Toberman
Secretary of State
State Capitol Building
Jefferson City, Missouri



Dear Mr. Toberman:

This department is in receipt of your request for our
official opinion, which reads as follows:

"Your official opinion is respectfully
requested upon facts hereinafter set
forth:

A foreign corporation, organized
and existing in the State of Minnesota,
who manufactures, distributes and sells
its product to wholesalers in every
state in the United States, proposes to
transport its product by carriers for
hire to a Missouri terminal and ware-
house corporation to be held by that
terminal and warehouse, in transit, for
an undetermined time, there to be mingled
with other shipments from Minnesota;
neither the foreign corporation nor the
domestic Missouri terminal warehouse
corporation or the stockholders, officers
or directors of either have any control
over the other save under the arrangement
hereafter mentioned, under the following
facts:

The foreign corporation receives
orders at its plant in Minnesota from
customers located in Missouri and other
states, requesting a shipment of the manu-
facturing corporation's product. On the

Honorable Walter H. Toberman

receipt of such orders, the manufacturing corporation will contact the carriers for hire to pick up a quantity of the corporation's product in Minnesota and move that product to the location of the terminal and warehouse corporation in Missouri. Then and thereafter the manufacturing corporation will issue shipping instructions from Minnesota by mail, to the terminal and warehouse corporation to move out of the terminal and warehouse various sized units of the product to customers of the manufacturing corporation by common carrier and other transportation services not belonging to the foreign corporation to ultimate destinations, both within and without the State of Missouri.

The corporation's product is classed as drugs in glass and comes packed in standard case units direct from the plant in Minnesota and is shipped by the terminal and warehouse corporation in the same original packaged case units which are not opened until reaching the customer.

The manufacturing corporation does not have and will not have an officer, salesman or employee whatsoever in Missouri. It will have no supervision, direction, or control over the terminal and warehouse corporation other than the warehouse arrangements previously described herein. All business is solicited by means of national and local advertising in magazines, U. S. mail, newspapers, radio, television and other like advertising media. The whole intent and purpose of the warehouse arrangement was and is to provide a directive in transit shipping method through which customers and users of the manufacturing corporations product may receive the benefits of more rapid and flexible delivery of the product as the orders are placed, as all orders to the manufacturer must be placed, at the plant of the corporation in Minnesota.

"QUESTION: Is the foreign corporation under the above facts doing business in the State of Missouri within the meaning of the General Corporation Act?"

Honorable Walter H. Toberman

Chapter 351, RSMo 1949, is in regard to general and business corporations and is ordinarily referred to as the general corporation act. Subsection 2, Section 315.015, provides that the terms "foreign corporation," as used in the chapter, unless the context otherwise requires it, mean a corporation for profit, organized under laws other than the laws of this state. Section 351.570, RSMo 1949, requires a foreign corporation, organized for profit, before transacting business in the State of Missouri, to procure a certificate authorizing it to do so, and reads as follows:

"A foreign corporation organized for profit before it transacts business in this state, shall procure a certificate of authority so to do from the secretary of state. Any foreign corporation organized for profit, other than a foreign corporation seeking authority to engage in the banking business in this state or a foreign corporation seeking authority to engage in a business in this state, the grant or refusal of which is at the time vested exclusively in some other board, bureau or administrative agency of this state, upon complying with the provisions of this chapter, may secure from the secretary of state a certificate of authority to transact business in this state, but a foreign corporation shall not be denied a certificate of authority by reason of the fact that the laws of the state under which such corporation is organized governing its organization and internal affairs differ from the laws of this state, and nothing in this chapter contained shall be construed to authorize this state to regulate the organization or the internal affairs of such corporation."

Section 351.575, RSMo 1949, gives the powers and duties of a foreign corporation desiring to do business in Missouri, and reads as follows:

"No foreign corporation shall transact in this state any business which a corporation organized under the laws of this state is not permitted to transact. A foreign corporation which shall have received a certificate of authority under this chapter

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shall, until a certificate of revocation or of withdrawal shall have been issued as provided in this chapter, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; nor shall it hold any real estate for any period longer than six years, except such as may be necessary and proper for carrying on its legitimate business; and, except as in this chapter otherwise provided, shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a corporation of like character organized under or subject to this chapter. Such foreign corporation so qualifying shall not, however, have the power to exercise in the state of Missouri any rights or powers which by any statute of the state of Missouri now in force are restricted specifically to domestic corporations or are specifically denied to foreign corporations."

The power to regulate commerce with foreign nations and among the several states has been granted to the Congress of the United States by Section 8, Article I of the Federal Constitution. Therefore, Missouri, nor any other state, cannot enact laws regulating business transactions between litigants of different states and which are in interstate commerce. If the activities of a foreign corporation, alleged to be doing business in Missouri, are actually transactions between citizens of Missouri and a foreign corporation, when such transaction takes place outside of Missouri, although finally completed in Missouri, they would be in interstate commerce and the above-quoted statutes pertaining to registration of foreign corporations would be inapplicable.

Doing business within a state by foreign corporations is more a question of fact than of law. The general rule and some illustrations as to when the foreign corporation is doing business within a state have been given in 20 C.J.S., page 46, and read as follows:

"The general rule is that, when a foreign corporation transacts some substantial part of its ordinary business in a state, continuous in character, it is doing, transacting, carrying on, or engaging in business therein, within the meaning of the statutes under consideration.

"Illustrations. In accord with this principle the following transactions have been held to constitute doing, transacting, carrying on, or engaging in business in a state: The making within the state of sales or of contracts for the sale of goods; the making of loans; the making of contracts of insurance; the execution of surety bonds; the acquisition and holding of real estate situated within a state; the management or development of such real property; the making of sales or contracts for the sale of such property, or of property situated elsewhere; the carrying on of a real estate brokerage business; the leasing of a machine for use in the state; the construction of railroads; the assembling, erection, or installation of machinery, and of office fixtures, screens, doors, and windows; the purchase of goods for resale; the management and operation of a manufacturing plant; the maintenance and display of printed advertisements; the carrying on of a 'trade campaign;' the making of contracts to furnish theatrical entertainments; and the contracting for and construction of a highway within the state. * * *"

From the facts related in the opinion request, a manufacturing corporation organized under the laws of the State of Minnesota does not have any agents, salesmen or officers, or any place of business in Missouri, and business is solicited in Missouri by magazine and newspaper advertisements and radio, television, and ads sent through the United States mail. Orders from customers in Missouri and other states for goods are received at the corporation's plant in Minnesota, where they are accepted or rejected.

Shipments of goods are sent to a warehouse in Missouri by common carrier, where the goods are stored. The corporation owning the Missouri warehouse is said not to have any connection with the Minnesota corporation except by contract, and for which it performs certain services for a consideration. It appears that the goods sent to the Missouri warehouse are packed at the factory, and upon their receipt at the warehouse they are not unpacked but are stored with other goods thus received. When the manufacturer accepts an order from a customer in Missouri or a neighboring state, it transmits a request to the warehouse corporation for a certain quantity of goods with which to fill the order from the stock stored in the warehouse, together with shipping instructions for sending the goods to the buyer.

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It is claimed that the whole intent and purpose of the warehouse arrangement is to provide a directive in transit shipping method through which customers and users of the manufacturer's product may receive the benefits of more rapid and flexible delivery of the product as orders are placed.

It is undisputed that the warehouse corporation in Missouri is the paid agent or employee of the foreign corporation. Actually, the warehouse corporation fills the orders and ships same to customers and acts only under instructions of the foreign corporation. It appears that such corporation is doing something more than having its goods stored in Missouri. The warehouse corporation is as much an employee of the foreign corporation as it would be if it were a part of the corporation's sales, production, or some other department or division of its organization in the State of Minnesota, and it further appears that the activities of the corporation are those for which it was organized, and it is believed that such practice is sufficient to take the entire transaction out of the exemption provided for interstate commerce under provisions of the Federal Constitution.

In this connection, we call attention to the case of Western Outdoor Advertising Co. v. Berbiglia, Inc., 263 SW2d 205. A foreign corporation engaged in the erection and maintenance of outdoor signs in Missouri was held to be doing business within the meaning of the statutes requiring foreign corporations doing business in Missouri to register and otherwise comply with said statutes.

The corporation continued to deal with the signs after interstate commerce ceased and derived its sole benefits from such dealings, title remaining in the corporation, and the corporation was to maintain the signs. It was also held that such corporation could not maintain an action for rental due on signs from a Missouri customer since it had not received a certificate authorizing it to transact business in the state. At l.c. 209 the Kansas City Court of Appeals said:

"In support of its contention that it was not doing business in this state contrary to the statutes plaintiff cites Republic Steel Corp. v. Atlas Housewrecking & Lumber Corp., 232 Mo. App. 791, 113 S.W. 2d 155; International Text-Book Co. v. Gillespie, 229 Mo. 397, 129 S.W. 922; York Mfg. Co. v. Colley, 247 U.S. 21, 38 S. Ct. 430, 62 L. Ed. 963; Hess Warming & Ventilating Co. v.

Honorable Walter H. Toberman

Burlington Grain & Elevator Co., 280 Mo. 163, 217 S.W. 493; Irvine Co. v. McColgan, 26 Cal. 2d 160, 157 P. 2d 847, 167 A.L.R. 934, and State ex rel. Hays v. Robertson, supra. We have read these cases and do not consider them controlling because of the different factual situations. In the Republic Steel Corp. case, we held that sales on consignment by a foreign corporation to a local factor was interstate commerce, and the presence of a sales office in the state did not convert the transaction to intrastate business. However, we recognized the rule that a determinative factor of whether the business was intrastate in nature was the question of continued dealing by the foreign corporation with the property after interstate commerce had wholly ceased, and whether that continued dealing was an isolated transaction or a continuing form of the business of the foreign corporation. That is the rule which is applicable in the instant case. * * *

In the present instance, if it were to be conceded that the shipments by the Minnesota corporation of goods to its Missouri warehouse was in interstate commerce, and that the shipper was not doing business in Missouri, the interstate nature of the transaction would end whenever the shipments had been received at the Missouri warehouse, and any further dealings, such as filling customers' orders from such shipments, would constitute intrastate and not interstate commerce transactions.

In pointing out our thought on this matter, we cite the case of Seneca Textile Corporation v. Missouri Flower & Feather Co., 119 SW2d 991. Plaintiff, a New York corporation, not qualified to do business in Missouri, brought suit in a justice of the peace court of St. Louis, Missouri, to recover the price of goods sold to a Missouri corporation. The defendant filed a general denial and further alleged that the plaintiff had failed to comply with the Missouri corporation statutes and was doing business within the state without first having procured a license authorizing it to do so. Upon appeal, the circuit court decided in favor of the defendant, and the case was thereafter appealed to the St. Louis Court of Appeals. In discussing the question

Honorable Walter H. Toberman

as to whether or not plaintiff was doing business in Missouri within the meaning of the applicable Missouri statutes, the court said at l.c. 994:

"We have reached the conclusion that there is ample evidence in the record to support the finding and judgment of the learned trial judge. The lack of qualification of plaintiff to do business in Missouri at the time of the transaction is not in dispute. In fact, it is conceded. A corporation can only act and do business by agents. Morris Friedman was its St. Louis agent. The business in St. Louis was conducted by him as plaintiff's alter ego and with the apparent intent to make it appear that the plaintiff was merely engaged in interstate commerce with which, under the authorities, there could be no interference. However, plaintiff maintained an office in St. Louis as well as a home office in New York. When it made a shipment of goods from New York and it was placed in the warehouse operated by the Holstein Express Company in St. Louis its interstate journey was ended. Then, when its agent, Morris Friedman caused these goods to be shipped out of the warehouse, to fill orders he had procured from St. Louis customers, that became an intrastate shipment and constituted 'doing business' by the plaintiff in the State of Missouri. This method of doing business made no interference with interstate commerce."

In view of the foregoing, it is our thought that the Minnesota corporation referred to in the opinion request is doing business within the State of Missouri, within the meaning of those terms as used in Chapter 351, RSMo 1949, the general corporation act, and must comply with Section 351.570 thereof, requiring a foreign corporation for profit, before transacting business within the state, to procure a certificate of authority to do so from the Secretary of State.

CONCLUSION

It is, therefore, the opinion of this department that a manufacturing corporation organized under the laws of Minnesota

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having no officer, agent or employee in Missouri to solicit business and such business is solicited by advertising in magazines, newspapers and advertising matter sent through the mail and over radio and television to prospective customers from its plant in Minnesota where all orders for goods are accepted, and such orders are filled and shipments to customers made from the corporation's stock of goods kept in a warehouse located in Missouri and owned by a Missouri warehouse corporation which has no relation to the former except by contract, and the Minnesota corporation furnishes directions for filling orders and making shipments to customers to said warehouse corporation, that such shipments to customers are not in interstate commerce but are intrastate shipments and the Minnesota corporation is doing business in Missouri within the meaning of such terms as used in Chapter 351, RSMo 1949, the general corporation act, and must procure a certificate from the Secretary of State authorizing it to do so under provisions of Section 351.570, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC:sm;ml

CHANGE OF VENUE: When a misdemeanor case is filed in one
MISDEMEANORS: county, is taken on a change of venue to
COSTS: another county where the defendant is ac-
quitted, the county in which the informa-
tion was originally filed shall be liable
for the costs of the proceedings.



March 15, 1957

Honorable Donald P. Thomasson
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"The Magistrate Judge of Bollinger Coun-
ty has requested that I get an opinion
from you regarding the following ques-
tion together with a statement of facts:

"Some months ago a complaint and informa-
tion were filed in the Magistrate Court
of Madison County, Missouri, the complaint
being signed by R. C. Caldwell, Trooper,
and the information by the Prosecuting At-
torney of Madison County, charging one
Victor Leon Harmon with careless and reck-
less driving. This case was sent to Bol-
linger County on a change of venue on the
application of the defendant and the case
was tried in the Magistrate Court of Bol-
linger County, Missouri and the defendant
was acquitted. I would like to know who
is to pay the costs in the case, whether
Madison County or Bollinger County should
pay the costs."

We would first direct your attention to Section 550.040,
RSMo 1949, which reads:

"In all capital cases, and those in
which imprisonment in the peniten-
tiary is the sole punishment for the

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offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

In the situation which you present to us the information was originally filed in Madison County. We believe the above section is applicable to your situation.

We also direct your attention to Section 550.120, RSMo 1949, which reads:

"In any criminal cause in which a change of venue is taken from one county to any other county, for any of the causes mentioned in existing laws, and whenever a prisoner shall, for any cause, be confined in the jail of one county for an offense committed in another county, and in which costs are liable to be paid out of a county treasury, such costs shall be paid by the county in which the indictment was originally found or the proceedings were originally instituted; and in all cases where fines are imposed upon conviction under such indictments or prosecutions, or penalties or forfeitures of penal bonds in criminal cases, are collected, by civil action or otherwise, payable to the county, such fines, penalties and forfeitures shall be paid into the treasury of the county where such indictment was originally found or such prosecution originally instituted, for the benefit of the public school fund of the county."

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This would clearly seem to indicate that Madison County should be liable for the costs in the situation which you present, since it is the county in which the indictment "was originally found" and in which "the proceedings were originally instituted."

CONCLUSION

It is the opinion of this department that when a misdemeanor case is filed in one county, is taken on a change of venue to another county where the defendant is acquitted, that the county in which the information was originally filed shall be liable for the costs of the proceedings.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

CORPORATIONS:

That portion of Sec. 368.040, RSMo 1949, which relates to special charges in addition to interest rates, is invalid because of its conflict with Sec. 44 of Art. III of the Constitution. A corporation may be incorporated under the provisions of Chapter 368, since the remaining portions of the chapter constitute a workable plan without the invalid portions.



December 9, 1957

Honorable Walter H. Toberman
Secretary of State
Capitol Building
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion is as follows:

"Proposed articles of incorporation for a corporation styled and titled 'C. M. Loan and Investment Company' have been submitted to this department, by counsel, for incorporation under Chapter 368, R.S. Mo., 1949. In view of the apparent conflict between certain provisions of this chapter (Loan and Investment Companies - Chapter 368, supra) and Section 44 of Article Three, Constitution of Missouri, 1945, the following questions are submitted:

"Are the charges, in addition to the interest rate, which are allowed under the provisions of Section 368.040, supra, invalid and void when construed with the language of Section 44, Article Three, Constitution of Missouri, 1945?

"If your answer is in the affirmative, then the following question is submitted:

"May a corporation be incorporated under the provisions of Chapter 368, R.S. Mo., 1949?

"Enclosed you will find a photostatic copy of the proposed articles; especially

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note the fourth paragraph of Article Eight. Enclosed also find a letter from J. E. Taylor dated July 1, 1946 wherein certain views were expressed concerning another statutory law. It would appear that the same reasoning which was applied to that particular law would apply in this case."

Unless otherwise indicated, all references to statutes are to RSMo 1949.

We note paragraph four of article eight of the proposed articles of incorporation of G. M. Loan and Investment Company, which paragraph reads:

"To charge and receive for such loans and negotiations, such interest and profits as may be permitted by the laws of the State of Missouri and more particularly Sections 368.010 and et seq RSMo 1949."

That portion of Chapter 368 relating to the powers of loan and investment companies relative to charges on loans is 368.040, which reads:

"In addition to the general powers conferred upon corporations by chapter 351, RSMo 1949, every loan and investment company organized under the provisions of this chapter shall have the following powers:

(1) To lend money to any person, firm or corporation, secured by the obligation of such person, firm or corporation or otherwise;

(2) To sell or offer for sale its secured or unsecured evidences or certificates of indebtedness or of investment and to receive from investors therein or purchasers thereof payments therefor in installments or otherwise with or without allowance of interest on such installments, whether such evidences or certificates of indebtedness or of investment be hypothecated for a loan or not, and to enter into contracts in the nature of a pledge or

otherwise with said investors or purchasers with regard to said evidences or certificates of indebtedness or of investment securing any loan, and no such transaction shall in any way be construed to effect the rate of interest on such loan, nor to constitute a violation of any other law, conditioned that there be compliance with the limitations thereon in this section contained; provided, however, that no such evidences or certificates of indebtedness or of investment, payable in installments, shall be sold wherein the aggregate amount of the installment payments agreed to be paid therefor shall be in excess of the face amount thereof, and further that evidences or certificates of indebtedness or of investment payable in installments and hypothecated for a loan with such loan and investment company shall not be for an amount in excess of the actual amount of the proceeds of the loan, plus any interest which may be taken in advance, or discount at a rate not to exceed the lawful rate of interest, together with charges permitted by this chapter, and that, with the exception of the last payment, no payment in excess of equal weekly, semimonthly, or monthly payments, extending over the entire period for which the loan is made shall be required by the terms of such evidences or certificates of indebtedness or investment payable in installments which have been so hypothecated; and provided further, that at the maturity of any note or loan or at any time payment or settlement is made or demanded thereon, any evidence or certificate of indebtedness or of investment issued in connection with or used as security for such note or loan, shall have a cash surrender value of an amount not less than the sum of all payments made upon it whether such evidence or certificate shall have matured or not;

(3) To charge for a loan made pursuant to this section two per cent of the amount loaned for any examination or investigation of the character and circumstances of the borrower, comaker or surety and the drawing and taking acknowledgment of necessary papers in making

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the loan; no charge shall be collected unless a loan shall have been made as the result of such examination or investigation; and provided further, that this charge shall not be collected from the same borrower more than once during any six month period;

(4) When a loan is made which is evidenced by a nondeficiency note secured in whole or in part by a chattel mortgage or other lien upon a motor vehicle and when it is provided in said note that said motor vehicle may be returned to the company voluntarily or otherwise, regardless of condition, in full satisfaction of the unpaid balance due thereon, after crediting any amounts paid on any certificate of indebtedness or of investment, if any, and a statement of such right be printed on the face of said note, and a simple and concise printed statement of such right be delivered to the borrower at the time the loan is made, to charge in addition to the interest and other charges permitted by this chapter, an additional five per cent of the face amount of the note; provided, however, that on a note in excess of four hundred dollars, this charge may be computed only on the first four hundred dollars of such note; and provided further, on a note under one hundred dollars, the charge may be computed as on a note of one hundred dollars; provided further, that whenever such a loan or note is renewed, extended or refinanced, or a new or additional loan secured in whole or in part by a lien against the same motor vehicle, any such renewal or extension or refinance, new or additional loan, shall not be subject to the charges provided in this paragraph when any such transactions exceed the number of one within any six month period."

Section 44 of Article III of the 1945 Constitution reads:

"Uniform interest rates.- No law shall be valid fixing rates of interest or return for the loan or use of money, or the service or other charges made or imposed in connection therewith, for any particular group or

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class engaged in lending money. The rates of interest fixed by law shall be applicable generally and to all lenders without regard to the type or classification of their business."

In *Household Finance Corporation v. Shaffner*, 203 SW2d 734, the Supreme Court said, 1.c. 737:

"It is not, and cannot be, denied that Section 44 prevents the fixing of interest rates for any particular group or class.

* * * *

"Section 44 does not prohibit the enactment of laws authorizing the formation and regulation of different types of lenders, such as banks, savings and loan associations, etc. Nor does it prohibit the enactment of laws providing reasonable classification of loans as to amounts, or otherwise, with different permissible rates of interest for different types of loans, but the rates provided for any type of loans, must be available to all lenders who make such loans, without regard to the type or classification of their business. Whether the constitutional provision is wise or unwise is not our province to decide."

In view of the above, it is the opinion of this department that the answer to your first question is in the affirmative, which is to say that the charges, in addition to the interest rate, which are allowed under the provisions of Section 368.040, are invalid and void because they are in conflict with Section 44 of Article III of the Constitution of Missouri.

Your second question is whether, if we find the charges in addition to interest rates, which are allowed under the provisions of Section 368.040, to be invalid and void when construed with the language of Section 44, Article III of the Constitution, which we do so find them to be, then may a corporation be incorporated under the provisions of Chapter 368, supra. In this respect we direct attention to Section 1.140, Senate Bill No. 79, Laws of 1957, which reads:

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"The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid, unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. Revised and reenacted Laws 1957, p. _____, S.B. No. 79, §1."

It is a familiar rule of statutory construction that, although a portion of a statute may be held to be invalid because of its unconstitutionality, yet that if that portion which remains is workable the remaining portions are to be considered operative.

In the case of Household Finance Corporation v. Shaffner, supra, the Missouri Supreme Court stated, l.c. 736:

"Both parties agree that Section 8171 cannot stand against Section 44 and, of course, that is true. Section 44 makes the the same interest rates available to all types of money lenders while Section 8171 purports to deny certain rates to banks and other institutions.

"Both parties have cited many authorities on rules for determining the validity of the remainder of a statute when some part of the statute has been rendered invalid by a later constitutional provision.

"The rule stated by Cooley in his Constitutional Limitations, 7th Ed., page 247, is sufficient for our present purpose. 'If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.'"

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In the case of State v. Curtis, 283 SW2d 458, at l.c. 463, et seq., the Missouri Supreme Court stated:

"It is well settled that a statute may be sustained as constitutional in part though void in other parts, unless its provisions are so connected and interdependent that it cannot be presumed the legislature would have enacted one without the other. "The test * * * is whether or not * * * after separating that which is invalid, a law in all respects complete and susceptible of constitutional enforcement is left, which the Legislature would have enacted, if it had known that the excised portions were invalid." State ex rel. Audrain County v. Hackmann, 275 Mo. 534, 205 SW 12, 14. The rule is thus succinctly stated in State ex inf. Hadley v. Washburn, 167 Mo. 680, 697, 67 S.W. 592, 596, 90 Am. St. Rep. 430: "Where the part of an act that is unconstitutional does not enter into the life of the act itself, and is not essential to its being, it may be disregarded, and the rest remain in force." Poole & Creber Market Co. v. Breshears, 343 Mo. 1133, 125 S.W. 2d 23, 33; 82 C.J.S., Statutes, §92, p. 149."

It would appear to be clear that Chapter 368, supra, is workable without the special provisions regarding charges in addition to interest rates, which we have held to be invalid. We believe, therefore, that a corporation may be incorporated under the provisions of Chapter 368 to operate at general rates of interest.

CONCLUSION

It is the opinion of this department that that portion of Section 368.040, RSMo 1949, which relates to special charges in addition to interest rates, is invalid because of its conflict with Section 44 of Article III of the Constitution.

It is our further opinion that a corporation may be incorporated under the provisions of Chapter 368, supra, since

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the remaining portions of the chapter constitute a workable plan without the invalid portions.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ld;ml

DRIVERS LICENSES:
APPLICATIONS MAY BE
DESTROYED BY DIRECTOR
OF REVENUE:
WHEN:

Paragraph 3, Section 301.360, RSMo 1949, which provides the Director of Revenue may destroy all applications for drivers licenses after four years, means that each and every application filed by the director in accordance with the provisions of Section 302.120, RSMo 1949, may be destroyed after four years from the date each application was filed.



June 3, 1957

Mr. H. J. Turnbull, Supervisor
Operator and Chauffeur
License Registration
Department of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Mr. Turnbull:

Your recent request for a legal opinion of this department, has been received, and reads as follows:

"I would like to have an official opinion from your office, regarding the destruction of certain records in this office.

"Paragraph 3 of Section 301.360 of the Motor Vehicle Law states 'that all applications for driver's licenses can be destroyed after four years'. Does this mean four years from the date the license was issued, or four years from the expiration date of the license?"

Paragraph 3, Section 301.360, RSMo 1949, referred to in the opinion request, reads as follows:

"The director of revenue may destroy the following records:

* * * * *

(3) All applications for drivers licenses after four years." (Underscoring ours.)

Section 302.120, RSMo 1949, requires the director of revenue to file every application for a driver's license received by him and keep records in connection therewith. Said Section reads as follows:

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"The director of revenue shall file every application for a license received by him and shall maintain suitable indices containing, in alphabetical order:

- (1) All applications denied and on each thereof note the reasons for such denial;
- (2) All applications granted; and
- (3) The name of every licensee whose license has been suspended or revoked by the director of revenue and after each such name note the reasons for such action.

2. The director of revenue shall also file all accident reports and abstracts of court records of convictions received by him under the laws of this state and in connection therewith maintain convenient records or make suitable notations in order that an individual record of each licensee showing the convictions of such licensee and the traffic accidents in which he has been involved shall be readily ascertainable and available for the consideration of the director upon any application for renewal of license and at other suitable times." (Underscoring ours.)

Your specific inquiry is whether or not the provisions of Paragraph 3, Section 301.360, supra, "that all applications for drivers licenses can be destroyed after four years" mean four years from the date the license was issued, or four years from the expiration date of the license.

While it is true the above-mentioned portion of Section 301.360 does not indicate when the four years referred to is to begin or end, yet there is nothing in this or any other section of the drivers' license law, which expressly, or by necessary implication, shows it to be the legislative intent that the Director of Revenue is authorized to destroy all drivers' license applications after four years from the date the license was issued, or four years after the expiration date of the license.

Sections 301.360 and 302.120, supra, both relate to drivers licenses, and are therefore in pari materia, and under

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established rules of statutory construction prevailing in Missouri, said sections must be read and construed together in order that both may be given effect.

In the case of Baker v. Brown's Estate, 294 SW 2d 22, the court gave some rules for construction of statutes and also defined the word "all" as used in the statute relating to motions for new trials. At l.c. 25, the court said:

"* * *In determining the meaning and application of the provisions of the statute to the question presented, the court should ascertain the legislative intent from the words used if that is possible, and in so doing give to such words their plain and ordinary meaning so as to promote the object and manifest purpose of the statute. A. P. Green Fire Brick Co. v. Missouri State Tax Commission, Mo., 277 S.W. 2d 544, 545[3].

"(4) The statute says that the motion for new trial is denied 'for all purposes.' The word 'all' is sometimes said to be the most comprehensive in the English language; it denotes the 'whole number of,' 'each' and 'every' State v. Hallenberg-Wagner Motor Co., 341 Mo. 771, 108 S.W. 2d 398, 401. The use of these all-inclusive terms indicates an intent to accomplish by operation of law each and every purpose achieved by a formal order of the trial court, timely made, overruling a motion for new trial. The act was not intended to change the method or scope of appellate review."

From the definition given of the word "all" in the above cited case, it is believed that such word is all inclusive, and means each and every article or thing to which it refers.

We note that the word "all" is used in Paragraph 3, Section 301.360 and Section 302.120. In the first section it refers to the destruction of each and every driver's license application after four years. In the second section it refers to the filing of each and every driver's license application, (1) denied and (2) accepted, and also to the keeping of certain records in connection therewith.

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It is further believed that paragraph 3, Sec. 301.360, supra, cannot be construed to mean that the Director of Revenue is authorized to destroy all drivers' license applications after four years from the date the license was issued, or four years after the expiration date of the license, for obviously such construction would not be in accord with the legislative intent. Such construction would ignore the commonly accepted meaning of the word "all" as defined in *Baker v. Brown's Estate*, supra, in that it would authorize the director to destroy a part of the applications for drivers licenses, i.e., only those which had been accepted and upon which licenses had been issued.

We have already noted that Section 302.120, supra, requires the director to file and keep records of all drivers license applications, those that have been denied and those that have been accepted. In view of these facts we believe that all as used in Paragraph 3, Section 301.360, has reference to each and every application required to be filed by the director as referred to in Section 302.120.

Therefore, reading and construing Paragraph 3, Section 301.360 and Section 302.120, supra, together, it is our thought that the director of revenue may destroy each and every driver's license application after four years as provided by the former section, and that the terms used therein, refer to four years after the date of filing each and every such application by the director as provided by the latter section.

CONCLUSION

It is therefore the opinion of this department that Paragraph 3, Section 301.360, RSMo 1949, providing that the director of revenue may destroy all applications for drivers licenses after four years, means that each and every application for driver's license filed by the director, in accordance with the provisions of Section 302.120, RSMo 1949, may be destroyed after four years from the date each application was filed.

The above foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

PNC:db:gm

LICENSES: Construction of Section 338.045, RSMo. Cum. Supp. 1955.
PHARMACISTS:



June 12, 1957

Honorable Thomas A. Walsh
Member, Missouri House of Representatives
Jefferson City, Missouri

Dear Mr. Walsh:

This will acknowledge receipt of your request which reads:

"Will you kindly render your official opinion on the right of a person to take another examination for a pharmacist's license in this state who failed to make a passing grade when he took the examination in 1937.

"This particular individual has been managing a drug store and compounding prescriptions in this state for more than thirty years prior to the effective date of Section 338.045, Cum. Supp. 1955."

A primary rule of statutory construction is to ascertain and give effect to the legislative intent and if possible such statutory intent should be determined from words used and put upon such language its plain and rational meaning and promote its objects. State ex inf. Dalton vs. Miles Laboratories, 282 S.W.(2d) 564; A. P. Green Fire Brick Co. vs. State Tax Commission of Mo. 277 S.W.(2d) 544.

Section 338.045, RSMo Cum. Supp. 1955, reads:

"Any person who is at least fifty-one years of age and who has resided in this state for at least thirty years before the effective date of this section shall, on compliance with this section, be given an examination by the board of pharmacy upon presentation of evidence establishing that he has been engaged in the management of a drug store or pharmacy and in the compounding of prescriptions for at least thirty years and upon successful completion of such examination such person shall be granted

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a license. Application for such examination shall be made on forms prescribed by the board and shall be accompanied by the fee required by section 338.070. Any person so licensed shall be entitled to all the rights and subject to all the duties prescribed by this chapter for applicants qualifying under sections 338.020 and 338.030."

It is quite apparent that the only purpose the Legislature had in enacting the foregoing statute was to make an exception as to qualifications of such person mentioned therein, for being licensed by the Missouri State Board of Pharmacy.

The fact that this person failed to pass the examination given by the Missouri State Board of Pharmacy in 1937, in the absence of any statute to the contrary, does not prevent his taking another examination.

In view of said statute, if the party referred to in your request can meet the requirements mentioned in said statute, he is entitled to take an examination and if he satisfactorily passes said examination the Board has no alternative but to issue him a pharmacy license.

The specific qualifications he must possess are as follows: He must present substantial evidence to the Missouri State Board of Pharmacy that (1) he must be 51 years of age; (2) he must have resided in this state at least thirty years prior to the effective date of Section 338.045, RSMo Cum. Supp. 1955; (3) He must establish to the satisfaction of the Missouri State Board of Pharmacy that he has been engaged in the management of a drug store or pharmacy and in the compounding of prescriptions for at least 30 years.

CONCLUSION

Therefore, it is the opinion of this Department that any individual who can meet the foregoing qualifications is entitled to take an examination for a pharmacist's license and if he successfully completes the examination, he is entitled to be licensed as a pharmacist in the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH:mw

HOUSE BILL NO. 10
69th GENERAL ASSEMBLY:
FEDERAL HIGHWAY:

The term "federal highway" means
only those which are marked as
U. S. routes.



August 8, 1957

Colonel Hugh H. Waggoner, Superintendent
Missouri State Highway Patrol
State Office Building
Jefferson City, Missouri

Dear Colonel Waggoner:

In your recent request for an official opinion from this office you inquired about the meaning of House Bill No. 10, passed by the 69th General Assembly, and stated your inquiry as follows:

"This bill does not define the term 'federal highway'. It is respectfully requested that you inform us if the term 'federal highway' applies only to those highways marked with the U. S. route markers or if it includes any highway on which federal funds have been expended for construction or maintenance."

There are no federal highways, as such, that is, none in the sense that the Federal Government owns, controls, etc. The U. S. routes are part of an interstate system; they are determined and decided upon by the joint action of the state highway officials of the various states and the department of commerce. The state highway officials act through the American Association of State Highway Officials; the Commerce Department acts through its Bureau of Public Roads. All of the U. S. marked highways in the State of Missouri are state highways and can be and, presumably, in some cases are part of the state highway system. The state highway system is provided for in Section 227.020.

The case of Sternberg Dredging Company v. Walling, 158 Fed. 2d 678, is authority for the proposition that in the

Colonel Hugh H. Waggoner

interpretation of a statute its words are to be taken according to the meaning given them in common usage, unless to do so produces an absurd result or one which defeats the purpose for which the act was passed.

A further general rule in the interpretation of a statute is that in ascertaining legislative intention reference should be had to the policy adopted by the legislature in reference to the particular subject matter, the object of the statute, and the mischief sought to be prevented or remedied. *State ex rel Lentine v. State Board of Health*, 65 S.W. 2d 943.

The courts will also, in determining the meaning of a statute, consider the particular mischief to be remedied and the history of the period and of the act itself. See *State ex rel Rippey v. Forrest*, 162 S.W. 2d 706.

The cases of *Betts v. Kansas City Southern Railway*, 284 S.W. 455; *Hannibal Trust Company v. Elzea*, 286 S.W. 371; *Christy v. Petrus*, 295 S.W. 2d 122; *State ex rel Jack Frost Abattoirs, Inc. v. Steinbach*, 274 S.W. 2d 588, are a few which are authority for the proposition that in construing statutes words of common use are to be construed in their natural and ordinary meaning. We think there can be no doubt but that the common understanding of the general public, when they speak of or read the term "federal highway" is that which means one marked with the U. S. highway sign.

The conviction that the legislature, in using the term "federal highways," meant only the marked U. S. routes becomes more firm upon a study of the act in question because, as you mentioned in your inquiry, federal funds are used on countless scores of our secondary roads, so-called farm to market roads, and others. Significant, too, we think, is the fact that the highway department has made an administrative interpretation that "federal highways" means only those marked as U. S. routes through the state. We think there can be no question but what these, and these only, are the ones that the legislature had in mind when they used the term "federal highway."

CONCLUSION

Thus, from the provisions of the act itself, from the history of the so-called speed law in our state, from the

Colonel Hugh H. Waggoner

general public's understanding of the term "federal highway" and from an application of the rules laid down in the above cited cases, we think that there can be no question but that the legislature, in using the term "federal highway," meant only those which are marked as U. S. routes.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours,

John M. Dalton
Attorney General

RSN:lc

COUNTY COURTS:
COUNTY HOSPITALS:
BOND ISSUES:



County court does not possess the authority to call for an election upon a bond issue for the erection of a county hospital; such an election must be by petition of the taxpayers of the county as set forth in Section 108.040, RSMo 1949. When such an election is held and such bond issue is carried that the county court must proceed with the erection of the hospital.

May 2, 1957

Honorable Edward C. Westhouse
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I would appreciate it very much if you could render me an opinion on several problems which concern the erection of a county hospital.

"Several of the citizens of Madison County desire to have a county hospital erected in this county, but the county court doesn't know as yet whether the tax burden would be too heavy on the citizens if the bond issue passed. (1) Can the county court decide on their own whether a bond issue should be submitted to the people and in what amount or can the citizens that desire the hospital force the county court to have a bond issue submitted to the voters in any certain amount? (2) If a bond issue was submitted to the voters and it passes, would the county be obligated to sell the bonds and begin the erection of a hospital? Or could the county court decide not to issue or sell the bonds on the ground that it would be prohibitive for the citizens of Madison County?"

Your first question is whether a county court can initiate and call for a bond issue election for the pur-

Honorable Edward C. Westhouse

pose of erecting a county hospital, or whether such an election must be initiated by petition of a certain number of taxpaying citizens of the county.

All references to statutes will be to RSMo 1949, unless otherwise indicated.

Section 205.160 reads:

"The county courts of the several counties of this state are hereby authorized, as provided in sections 205.160 to 205.340, to establish, construct, equip, improve, extend, repair and maintain public hospitals, and may issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties." (Emphasis ours.)

It will be noted that the above section gives the county court the power to "establish" a public hospital. The question which we must first consider, therefore, is whether by conferring upon county courts the power to "establish" county hospitals the court has the implied power to do all things necessary to effect this establishment. We do not believe such to be the case.

In the second place county courts do not possess implied powers, but only such powers as are conferred by statute. In the case of *State v. Philpot*, 266 S.W. 2d 704, at l.c. 710, the Missouri Supreme Court stated:

"County Courts are not now named among the 'constitutional courts' in which the judicial power of the state is vested, Article V, Constitution of Missouri 1945, V.A.M.S., but such courts are recognized in the Article treating with 'Local Government,' and they are given authority to 'manage all county business as prescribed by law'. Section 7, Article VI, Constitution of Missouri 1945, V.A.M.S. The authorities are uniform to the effect that, out-

Honorable Edward C. Westhouse

side of the management of the fiscal affairs of the county, such courts possess no powers except those conferred by statute. Rippeto v. Thompson, 358 Mo. 721, 216 S.W. 2d 505, 508; Bradford v. Phelps Co., 357 Mo. 830, 210 S.W. 2d 996, 999; Lancaster v. Atchison Co., 352 Mo. 1039, 180 S.W. 2d 706, 708; State ex rei Walther v. Johnson, 351 Mo. 293, 173 S.W. 2d 411, 413."

Nowhere in the statutes is this power to call for a bond election conferred upon the county court and we must, therefore, in the light of the Philpot opinion, supra, conclude that it does not possess this power.

In this case we refer again to Section 205.160 and to the underscored portion of that section which reads: "* * * and may issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties."

The general law covering the incurring of indebtedness by counties is found in Section 108.010 which reads:

"Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years; provided such indebtedness shall not exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

Also, in Section 108.020, which reads:

"Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an indebtedness for county purposes in addition to that authorized

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in section 108.010 not to exceed five per cent of the taxable tangible property shown as provided in said section."

And in Section 108.040, which reads:

"Whenever it may become necessary for any county in this state to incur an indebtedness as authorized in section 108.010 or 108.020, it shall be lawful for any number of qualified electors of such county who are taxpayers, but not less than one per cent or three hundred, whichever is greater, as determined by the vote for governor in the county in last election at which a governor was elected to present to the county court of such county a petition in writing setting forth the object and purpose for which the indebtedness is desired to be incurred and asking that an election be held to authorize the incurring of such indebtedness. Upon the presentation of such petition it shall be the duty of the county court of such county to order that an election be held for the purpose set forth in the petition, which order shall, among other things, specify the time, place and purpose of the election. Such an election may be a special election, or it may be held on the day of any primary or general election authorized to be held by the laws of this state."

In view of the above, therefore, it is our belief that the answer to your first question is that the county court cannot initiate and call for a bond issue election, but that this has to be done by petition in the manner set forth in Section 108.040, supra.

Your second question is, "If a bond issue was submitted to the voters and it passes would the county be obligated to sell the bonds and begin the erection of a hospital?"

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It is our belief that if the election is held and the bond issue passes it shall be the duty of the county court to proceed with the erection of the hospital. This, we believe, is made plain by Section 108.070, which reads:

"If it appears from the results of the examination and casting up of the returns of the said election as certified to the county court that two-thirds or more of the qualified voters of such county voting on the proposition submitted, were in favor of incurring such indebtedness, the court shall make an order reciting the holding of such election and the result thereof, both for and against the proposition. If the result of the election as certified shall be in favor of the issuing of bonds, said bonds shall be sold at such time and in such amounts as the court may from time to time order and direct. The county court shall provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to create a sinking fund for the payment of the principal thereof within twenty years from the date of contracting the same."

It will be noted that the above section states that: "If the result of the election as certified shall be in favor of the issuing of bonds, said bonds shall be sold at such time and in such amounts as the court may from time to time order and direct."

It will be noted that the language of the statute is that the court "shall" proceed to issue the bonds. It is well-established that the word "shall" when used in a statute is mandatory and not discretionary.

In the case of State v. Wurdeman, 246 S.W. 189, at l.c. 194, the Missouri Supreme Court stated:

"* * * Usually the use of the word 'shall' indicated a mandate, and unless there are other things in a

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statute it indicates a mandatory
statute. * * **

CONCLUSION

It is the opinion of this department that a county court does not possess the authority to call for an election upon a bond issue for the erection of a county hospital, but that such an election must be by petition of the taxpayers of the county as set forth in Section 108.040, RSMo 1949.

It is the further opinion of this department that when such an election is held and such bond issue is carried, that the county court must proceed with the erection of the hospital.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

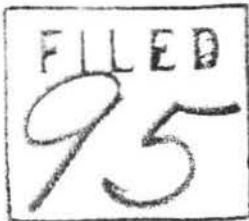
Very truly yours,

John M. Dalton
Attorney General

HPW:vlw:lc

COUNTY HOSPITAL
BOARD OF TRUSTEES:
EMPLOYMENT OF ARCHITECT:

The board of trustees of a county hospital is authorized to employ an architect to draw up the plans and specifications for such a hospital.



May 8, 1957

Honorable Edward C. Westhouse
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Previously I wrote to you asking your opinion on several questions concerning the matter of a county hospital. You assigned the request to your assistant, Hugh P. Williamson, to answer the question.

"Upon the same general matter of a county hospital, I would like to ask your opinion as to whether the county court can make an agreement with an architect to prepare preliminary drawings of a hospital, surveys and all other matters necessary for application to the Hill-Burton Committee for Federal aid. This agreement contains the provision that the county court must employ this architect, if the bond issue passes by vote, to draw up the actual plans and specifications for the hospital. This agreement would be all right in my estimation if the county court was the body to employ the architect, but I believe that it is up to the Board of Trustees, who are appointed by the county court, and later elected by the people, would be the body to select and hire the architect.

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"Therefore, would you please inform me which body or group select and employ the architect?"

In regard to the above, I direct your attention to paragraph 4 of Section 205.190, RSMo 1949, which paragraph reads:

"The board of hospital trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, not inconsistent with sections 205.160 and 205.340 and the ordinances of the city or town wherein such public hospital is located. They shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, and of the purchase of site or sites, the purchase or construction of any hospital buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose; provided, that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of the hospital fund, and paid out only upon warrants ordered drawn by the county court of said county upon the properly authenticated vouchers of the hospital board." (underscoring ours.)

From the underlined portion of the above quoted paragraph, it would appear to be clear that after its appointment, the hospital board of trustees is in complete charge of the hospital. Since the employment of an architect is an indispensable prerequisite to the erection of a hospital and since the board of trustees is charged with the construction of any hospital building, we believe that the employment of an architect would be in the hands of the board of trustees.

We note that Section 205.250, RSMo 1949, reads:

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"No hospital buildings shall be erected or constructed until the plans and specifications have been made therefor and adopted by the board of hospital trustees, and bids advertised for according to law for other county public buildings."

The above section would appear to strengthen the conclusion which we have reached above.

Section 205.160, RSMo 1949, reads:

"The county courts of the several counties of this state are hereby authorized, as provided in sections 205.160 to 205.340, to establish, construct, equip, improve, extend, repair and maintain public hospitals, and may issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties." (underscoring ours.)

It will be noted that the above section charges the county court with the duty to "establish, construct . . . public hospitals." We believe, however, that this section is entirely compatible with our previous conclusion, and that the board of trustees, in the construction of a hospital, is acting as the agent of the county court.

CONCLUSION

It is the opinion of this department that in the erection of a county hospital, it is the duty of the board of trustees of such hospital to employ the architect who will draw up the plans and specifications of such hospital.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW:db:lc

COUNTY CORONERS: Method and procedure for calling a jury to hold an inquest. If said jury is sworn in they must remain together except when the jury consists of men and women.



December 9, 1957

Honorable Edward C. Westhouse
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"Section 58.260, RSMo 1949 states that the coroner shall hold an inquest when he is 'notified of the dead body of any person, supposed to have come to his death by violence or casualty.' Further Section 58.310, RSMo 1949 states that the jury shall determine 'the death of the person, whether he died by felony or accident' and other matter.

"Do these actions prevent the coroner from exercising any jurisdiction in the matter as to whether an inquest shall or shall not be held? That is, if an investigation is made and everyone that knows anything about the death cooperates in the investigation so that there can be no doubt as to what occurred and who the parties were and all other matter as set forth in Section 58.310, be it an accident or a felony, must the coroner hold an inquest?

"Secondly, if the body is to be buried before a coroner's inquest is held, what would be the proper procedure? That is, can a group of men be assembled, as an arbitrary number, say twelve, to view the body; then when the inquest is to be held select six of those to hear it, so six can be sworn at the time the hearing is held? Or must they be sworn, according to Section 58.320, RSMo 1949, before they view the body? If this be the case, then it would seem that they must be kept together until the hearing is held."

In answering your first inquiry we are enclosing a copy of an

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opinion rendered by this Department under date of March 20, 1946, to the prosecuting attorney of Lewis County, Missouri, Honorable David W. Wilson, holding that a coroner exercises sole discretion in determining whether to hold an inquest.

Your second inquiry concerns the proper procedure to follow if the body is to be buried prior to the coroner's inquest and, further, if twelve men could be assembled to view the body then later when the inquest is to be held, select six men to hear it and the six men would not be sworn until the time of hearing, or must they be sworn according to the provisions of Section 58.320, RSMo 1949, before viewing the body?

Again, we refer you to a former opinion rendered by this Department to G. C. Beckham, prosecuting attorney of Crawford County, under date of November 26, 1951, a part of which reads:

"Under our statutes, a 'view' or an 'inquest' must be held where the person is 'supposed to have come to his death by violence or casualty.' This, of course, requires a jury. Section 58.610 RSMo 1949, however, makes an exception to the above where some credible person declares under oath to the coroner that the person whose body is to be viewed, came to his death by violence or crime; then in that event the coroner shall not order a jury but shall himself view the body and declare the cause of death. With the above statutory exception there must be an 'inquest' before there can be a 'view.' A view of the body is a part of the inquest as these terms are used in the coroner's and inquest law of the State of Missouri."

In view of the foregoing opinion, a view of the body without a jury can be made only under one circumstance and that is under the exception provided for under Section 58.610, RSMo 1949, which is, where some credible person declares to the coroner under oath that said deceased person came to his death by violence or crime, then the coroner shall view the body without a jury and declare the cause of death. In all other instances there must be an inquest before there can be a view of the body.

In *Rex v. Ferrand*, (K.B. 1819 reported in 7 English Ruling Case, 144, it was held that a coroner's jury must be sworn before the view of the body is taken. In so holding it was said at l.c. 145, and 146:

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"* * * *Now, taking the whole of this together, it appears to me that there can be no good inquest, unless the coroner and the jurors are both present at the same time, and the oath is administered by the former to the latter super visum corporis. If, indeed, after this inquest had proceeded, upon the arrival of the coroner himself, both he and the jury had gone to view the body, and the jury had then been resworn, it might have been a good inquest. That, however, was not done; and, therefore, I am of opinion that this inquest was wholly void, and that we ought not to grant any mandamus to continue its proceedings.

* * * * *

* * * *Now in the present case it appears that on the 8th day of September the oath of inquest was administered, and the dead body viewed by the jury. But then the oath was administered by a person wholly without authority. At that time, therefore, the jury were not under a valid obligation to inquire, but were mere strangers to the transaction. And when the jury were sworn afresh by the coroner, upon his arrival, it was not done super visum corporis. Nor, indeed, did they ever view the body after the oath was administered to them by the coroner. For though, on the 24th of September, the coroner viewed the body, the jury were not then present. I am, therefore, of opinion that we ought not to make this rule absolute. * * * *"

Section 58.260, VAMS is authority for a coroner summoning a jury for an inquest and reads:

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the sheriff of the county where the dead body is found, requiring him forthwith to summon a jury of six good and lawful citizens of the county, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and

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by whom he came to his death."

It will be noticed the foregoing statute requires the coroner to summon a jury for an inquest and to view the body as soon as he shall be notified of the dead body supposed to have come to his death by violence or casualty and found in the county.

Section 58.130, VAMS, provides for giving an oath to said jurors called for the inquest.

Section 58.310, VAMS prescribes the function of the jurors after being sworn and reads:

"As soon as the jury shall be sworn, the coroner shall give them a charge, upon their oaths, to declare of the death of the person, whether he died by felony or accident; and if of felony, who were the principals and who were accessories, and all the material circumstances relating thereto; and if by accident, whether by the act of man, and the manner thereof, and who was present, and who was the finder of the body, and whether he was killed in the same place where the body was found, and, if elsewhere, by whom, and how the body was brought there, and all other circumstances relating to the death; and if he died of his own act then the manner and means thereof, and the circumstances relating thereto."

Section 58.320 VAMS, further provides that if the jury is sworn they shall remain together with one exception, and that is where there are women members when the jury is not receiving evidence or deliberating on its verdict the men and women members may separate. Said section reads:

"When the jury are sworn they shall remain together, and proclamation shall be made for any persons who can give evidence to draw near, and they shall be heard; provided, however, when there are women members of a jury, they may separate from the men members of the jury, if any, when not receiving evidence or deliberating upon their verdict."

Since a view of the body cannot be made without an inquest and jury, with one exception thereto, referred to in Section 58.610, supra, and also under the requirement of Section 58.260, supra, as soon as the coroner is notified of the dead body supposed to have come to his

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death he shall summon a jury for an inquest and view of the body, and under Section 58.310, supra, requiring a coroner to charge the jury as soon as it is sworn in, it all clearly indicates that the jury shall consist of only six citizens who shall be sworn in as soon as they appear in answer to the summons and shall not perform any function, until sworn in, even the viewing of a body which is a part of an inquest. Furthermore, the jury shall remain together after being sworn in for jury service except when there are women on the jury when not receiving evidence or deliberating upon their verdict.

We realize this has not always been the practice of members of coroner juries and in certain instances it might be expedient to proceed in other ways, however, in order to do so we believe that the matter should be referred to the General Assembly for consideration.

CONCLUSION

Therefore, it is the opinion of this Department that the matter of holding an inquest rests solely within the discretion of the coroner. Furthermore, if the coroner decides to hold an inquest and the deceased is to be buried, the coroner is vested with no statutory authority to call in twelve men to view the body and later, when the inquest is held, select six as a jury to hear the case and be sworn in at that time. All he can do is follow the hereinabove statutory procedure if he deems an inquest shall be held, then he shall summon six persons for the jury, swear them in and view the body.

Furthermore, if the jury is sworn in they must remain together with one exception, when some members of the jury are women then the women may separate from the men on the jury when said jury is not receiving evidence or deliberating on their verdict.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

Enclosure(1)

ARH:mw

SCHOOLS: In making adjustment and apportionment of property and indebtedness on change of boundary lines between school districts, boards of education must take into consideration all factors mentioned in §165.014, RSMo, Cum. Supp. 1955, and may consider other factors if necessary to arrive at just and proper apportionment. Amount awarded by agreement or by arbitration may be paid and enforced as any other valid claim against district.

SCHOOL DISTRICTS:



March 28, 1957

Honorable Hubert Wheeler
Commissioner of Education
State Department of Education
Jefferson Building
Jefferson City, Missouri

Dear Sir:

This is in response to your request for opinion dated February 26, 1957, which reads as follows:

"Inquiries have come to this Department from several boards of education about the application of the new law, Section 165.014, effective August 29, 1955, which provides for the apportionment of property and obligations whenever there is a change of boundary lines between school districts. The board of education of Consolidated District 2 of Audrain County has asked how this law would apply in the adjustment of school district indebtedness if their district should become indebted by a bond issue, and after such indebtedness had been established, part of the district should become annexed to some other district by means of a boundary change.

"Section 165.014 provides that in making the adjustment and apportionment of property and indebtedness when boundary lines between districts are changed, the amount and assessed value of land acquired by or taken from the district, as compared with the amount and assessed value of other land in the district and other property in the district shall be taken into consideration in determining the

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amount that shall be paid or in apportioning the indebtedness that shall be assumed and paid by any of the districts. Section 165.015 provides for a board of arbitration if the school boards cannot agree upon the proper adjustments.

"In your opinion to this Department on March 22, 1956, it was pointed out that when school district boundary lines are changed boards of education may proceed immediately to adjust and apportion the property and liabilities of the respective districts under Section 165.014.

"Prior to the enactment of Sections 165.014 and 165.015 in 1955, two other opinions had been written which do not seem to harmonize with the laws of 1955. In your opinion of May 6, 1953 to Honorable Douglas Mahnkey, Prosecuting Attorney of Taney County, it was held that territory detached from a school district does not remain liable for the bonded indebtedness incurred by said district before separation. On September 1, 1938 the Attorney General ruled in his opinion to Mr. J. Robert Barton, Deputy Circuit Clerk of Oregon County that where part of the territory of a bonded school district is attached to another school district, the bonded district becomes liable for the balance of the bonded indebtedness. If enough tax cannot be levied on the territory in the original district to pay the bonds and interest as they fall due, then the bondholders can look to the detached portion of the original district for its pro rata share of the debt.

"I respectfully request your advice and official opinion in answering the following questions:

1. Section 165.014 provides for the adjustment and apportionment of property and indebtedness when boundary lines are changed between school districts. If part

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of the territory of a bonded school district is attached to another district by change of boundary lines, would the boards of education of the districts affected be authorized by this law to apportion the indebtedness between the districts affected on the basis of assessed valuation taken from the bonded district as compared with the remaining assessed valuation of the bonded district?

If so, how may the boards of education establish such a legal adjustment and make payment of the amount due on the bonded debt?

2. Do the opinions of May 6, 1953 and September 1, 1938, referred to herein conflict with Sections 165.014 and 165.015, Laws of 1955, which were enacted subsequent to the opinions? If not, how may they be reconciled with the laws of 1955, which provides for the apportionment and adjustment of school district property and indebtedness when boundary lines are changed between school districts?"

Sections 165.014 and 165.015, RSMo, Cum. Supp. 1955, read as follows:

Sec. 165.014. "1. Whenever (1) any school district is abolished and its land reverts to or becomes a part of two or more school districts, or (2) a new district is made by the creation of a new city or incorporated town or school district, out of one or more school districts, or (3) the boundary lines of any district are changed by the changing of the boundary lines of any city, incorporated town, or school district, or (4) any part of any school district is merged with any other district or districts or parts thereof, the boards of directors or boards of education of the school districts to which land has been annexed or from which land has been taken, or which have been newly created, shall make a just and proper adjustment and apportionment of all school property, real and personal, including funds, as well as indebtedness, if any, to and

among such school districts. Such adjustment and apportionment shall be made as of the date of the decree or order creating the new city or town or of the vote of the electors effecting such annexation, change of boundaries, or merger.

"2. In making the adjustment and apportionment of property and indebtedness mentioned in subsection 1, the amount and assessed value of land acquired by or taken from the districts, as compared with the amount and assessed value of the other land in the districts, as well as the value of the school grounds, together with the buildings thereon, and the furniture and equipment therein, and any other school property in such districts, shall be taken into consideration in determining the amount, if any, that shall be paid by one district to another, or in apportioning the indebtedness, if any, that shall be assumed and paid by any of the districts. Such adjustment and apportionment of property and liability shall be made by the boards of school directors of the several districts concerned, before or during the first school year after such boundaries have been changed."

Sec. 165.015. "1. If the boards of directors or boards of education of the several districts cannot agree upon an adjustment and apportionment of property and indebtedness as provided in section 165.014, the board of either district may appeal to the county superintendent of public schools, or in case the affected districts are in more than one county, to the county superintendents of both counties, who shall either individually or jointly as the case may require, appoint four persons as a board of arbitration to make an adjustment and apportionment of property and indebtedness in accordance with section 165.014. The board of arbitration and county superintendents shall proceed in the manner as provided by section 165.170 but it may hold hearings after giving the affected districts reasonable notice thereof before making its award.

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"2. Any sum awarded by agreement of the boards of directors or boards of education or by decision of a board of arbitration to any school district shall be a legal and valid claim in its favor and against the school district charged therewith. The amount of debt, if any, apportioned to any school district shall be a legal and valid claim against the school district charged therewith. Upon the filing of the agreement of the boards of directors or boards of education or of the decision of the board of arbitration with the county superintendent, the claim or indebtedness charged against any school district may be collected in the same manner as other claims against a school district."

These two sections were enacted in 1955 by the 68th General Assembly, repealing and replacing Sections 165.180, 165.183, 165.290 and 165.293, RSMo 1949.

Under Section 165.014, supra, when land is taken from a bonded district and attached to another district, the boards of education "shall make a just and proper adjustment and apportionment of all school property, real and personal, including funds, as well as indebtedness, * * * to and among such school districts." (Emphasis ours.)

In Subsection 2 of Section 165.014, supra, a guide is given whereby school boards may determine what a just and proper adjustment and apportionment is. It is specified therein that in making such adjustment and apportionment the amount and assessed value of land acquired by or taken from the districts, as compared with the amount and assessed value of the other land in the districts, as well as the value of the school grounds, together with the buildings thereon, and the furniture and equipment therein, and any other school property in such districts, shall be taken into consideration. Clearly, the boards of education may not consider only the assessed valuation of the detached portion of the district, as compared to the remaining assessed valuation of the bonding district, but must also consider the other factors underscored above.

In saying that these things listed in the statute "shall be taken into consideration," we do not understand the Legislature to mean that these are the only things which may be taken into consideration by the boards of directors in making their adjustment and apportionment. Other factors not so readily apparent

Honorable Hubert Wheeler

may also be present in any given situation which could well be taken into consideration in arriving at a "just and proper" adjustment and apportionment. It would be impossible to anticipate all the problems which might arise in a situation such as this. The underlying principle, however, is to arrive at an adjustment and apportionment which, under the facts of any given case, is just and proper.

There are, of course, no Missouri cases construing Sections 165.014 and 165.015, supra, and although we have examined many cases in other jurisdictions, we find them of very little help because based on differently worded statutes. For example, a Michigan statute made the change in boundary lines or separation from the indebted district contingent upon an apportionment of the indebtedness. Board of Supervisors v. Thompson, 61 Fed. 914, 10 C.C.A. 154. In addition, the courts apparently have different conceptions of the basis to be used in arriving at an equitable settlement of the property and indebtedness in cases like this.

For example, in State ex rel. Board of Education of Swanton Village School Dist. v. Board of Education of Sharples Village School Dist., 114 Ohio St. 603, 605, 151 NE 669, under a statute requiring an equitable division of the funds and indebtedness of the two districts, the court held that "a division in the proportion that the taxable value of the transferred district bears to the taxable value of the original district is not only an equitable division, but the only basis upon which an equitable division can be made."

In that case, "indebtedness" was held to include all liabilities incurred prior to the date of the transfer, including bonded indebtedness, contractual obligations, such as building contracts, teachers' contracts, janitors' contracts, and the like, though not as yet fully performed. See also State ex rel. Board of Education of South Zanesville Village School Dist. v. Bateman, 119 Ohio St. 475, 164 NE 516; State ex rel. v. Board of Education, 65 Ohio App. 273, 29 NE2d 878.

In Livingston v. School Dist. No. 7 of Brookings County, 9 So. Dak. 102, 68 NW 167, 169, there was no statute providing for apportionment, but the South Dakota court had a different version of the equities of the situation. At NW 1.c. 169 the court said:

" * * * As we have seen, without some express legislation imposing a liability upon the new districts, they cannot be held liable

Honorable Hubert Wheeler

at law for the debts of the old district, and certainly there are in this case no equitable grounds alleged for imposing a liability for the debt of the old district upon the new. When the inhabitants of the new districts ceased to receive benefits from the school building in the old district, and were compelled to provide new buildings for themselves, they, in justice, were entitled to be relieved from liabilities incurred by the old district for school buildings no longer of any use to them. As between themselves, therefore, there was no liability for which the new districts could be held. * * *

In construing Section 165.180, RSMo 1949, repealed in the enactment of Sections 165.014 and 165.015, supra, the Kansas City Court of Appeals, in the case of Cleveland Village School Dist. No. 118 of Cass County v. Zion, 195 Mo. App. 299, 190 SW 955, 956, said:

" * * * Where the statute provides a method of procedure by which the school districts may adjust their differences, that method must be followed. * * * The law contemplates that school matters will be administered by men without technical training in the law, and seeks to provide, in so far as it is possible, a method by which they may adjust their own matters among themselves by a speedy and somewhat informal procedure. * * *"

Consequently, in answer to the first part of your first question, we are of the opinion that, in arriving at an adjustment and apportionment of the property and indebtedness of two districts affected by a change of boundary lines, the boards of education of the two districts must take into consideration not only the ratio which the assessed valuation of the detached portion bears to the remaining assessed valuation of the indebted district but also all the other factors mentioned in Subsection 2 of Section 165.014, supra. We are also of the opinion that such boards may take into consideration other factors which, if present in any given case, may be necessary in order to arrive at a "just and proper" adjustment and apportionment.

The adjustment may be established in one of two ways, either by agreement of the two boards or, if they are unable to

Honorable Hubert Wheeler

agree, by submission to a board of arbitration as provided in Section 165.015, supra. In either event, when the adjustment is made, any sum awarded becomes a valid claim in favor of the district to which awarded and against the school district charged therewith. The same is true of indebtedness charged against one district and in favor of the other.

If territory is detached from a bonded district and annexed to another and upon an adjustment it is determined that the annexing district should assume a portion of the indebtedness of the bonded district, the bondholders must continue to look to the bonded district for the payment of the bonds. The bonded district, in turn, would have a claim against the annexing district for the amount of the indebtedness assumed by it in the adjustment.

In *Turnbull v. Board of Education*, 45 Mich. 496, 8 NW 65, 66, the Michigan court said:

" * * * A debt once existing must remain a debt against the corporation that created it, and its obligation is not destroyed by a change in corporate limits. If contribution is required, it must be obtained by the corporation and not by its creditors, unless otherwise provided by law."

In *Cleveland Village School Dist. No. 118 of Cass County v. Zion*, supra, at SW 1.c. 957, the Missouri court said, with relation to the formerly existing sections on this subject:

"We are of the opinion that these sections provide the only law applicable to the division of the property of the disorganized district, and that the procedure pointed out therein should be followed. When that is done and the rights of both districts are determined, if defendant still refuses to pay over the money, a remedy can be had to compel its payment."

Therefore, we are of the opinion that payment of the amount of indebtedness apportioned to one of the districts may be made and enforced the same as any other valid claim against the district.

Your next question deals with the reconciliation of the opinions rendered to J. Robert Barton dated September 1, 1938, and

Honorable Hubert Wheeler

Douglas Mahnkey dated May 6, 1953, with the provisions of Sections 165.014 and 165.015, supra. In the 1938 opinion it was held that when a portion of a school district is separated from it by a change of boundary lines and added to another district, then the original district from which a portion is detached retains all the property, powers, rights, privileges and liabilities and continues to be responsible for all of the debts and liabilities of such district. The 1953 opinion held that the portion of a district detached from a district which had a bonded indebtedness is not subject to taxation thereafter to discharge the bonded indebtedness previously incurred by the original district. Those opinions, insofar as they relate to indebtedness, and as far as they go, are still correct. The only difference now is that Sections 165.014 and 165.015, supra, provide for a just and proper adjustment and apportionment of the property and indebtedness which will create a valid claim by one district against the other. The creation of this claim does not alter the fact that the original district remains directly liable to the bondholders for the bonded indebtedness, nor does such claim change the title to the property. Although the territory detached may be subject to taxation in order to discharge the obligation owing from the annexing district to the bonded district, such detached portion is still not subject to direct taxation by the bonded district to discharge the indebtedness. Therefore, there is no conflict between the above-mentioned opinions and Sections 165.014 and 165.015, supra, insofar as they relate to indebtedness, but such opinions must be considered in the light of and in conjunction with such sections.

CONCLUSION

It is the opinion of this office that in making an adjustment and apportionment of the property and indebtedness of two school districts when the boundary lines are changed, the boards of education must take into consideration all the factors mentioned in Section 165.014, RSMo, Cum. Supp. 1955, and may consider other factors if necessary in order to arrive at a just and proper adjustment and apportionment. The adjustment may be established either by agreement of the boards of education or by arbitration as provided in Section 165.015, RSMo, Cum. Supp. 1955, and may be paid and collected as any other valid claim against the district.

It is the further opinion of this office that the opinions of this office dated September 1, 1938 to J. Robert Barton and May 6, 1953 to Douglas Mahnkey are not in conflict with Sections

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165.014 and 165.015, RSMo, Cum. Supp. 1955, insofar as they relate to the indebtedness of the original district, but must now be considered in conjunction with such sections.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Encs (2)

*Copies in
Vault*

SCHOOLS: In making adjustment and apportionment of property and indebtedness on change of boundary

SCHOOL DISTRICTS: lines between school districts, boards of education must take into consideration all factors mentioned in §165.014, RSMo., Cum. Supp. 1955, and may consider other factors if necessary to arrive at just and proper apportionment. Amount awarded by agreement or by arbitration may be paid and enforced as any other valid claim against district.

Opinion No. 96

March 28, 1957

(Amended September 9, 1964)



Honorable Hubert Wheeler
Commissioner of Education
State Department of Education
Jefferson Building
Jefferson City, Missouri

Dear Sir:

This is in response to your request for opinion dated February 26, 1957, which reads as follows:

"Inquiries have come to this Department from several boards of education about the application of the new law, Section 165.014, effective August 29, 1955, which provides for the apportionment of property and obligations whenever there is a change of boundary lines between school districts. The board of education of Consolidated District 2 of Audrain County has asked how this law would apply in the adjustment of school district indebtedness if their district should become indebted by a bond issue, and after such indebtedness had been established, part of the district should become annexed to some other district by means of a boundary change.

"Section 165.014 provides that in making the adjustment and apportionment of property and indebtedness when boundary lines between districts are changed, the amount and assessed value of land acquired by or taken from the district, as compared with the amount and assessed value of other land in the district and other property in the district shall be taken into consideration in determining the

Honorable Hubert Wheeler

amount that shall be paid or in apportioning the indebtedness that shall be assumed and paid by any of the districts. Section 165.015 provides for a board of arbitration if the school boards cannot agree upon the proper adjustments.

"In your opinion to this Department on March 22, 1956, it was pointed out that when school district boundary lines are changed boards of education may proceed immediately to adjust and apportion the property and liabilities of the respective districts under Section 165.014.

* * * * *

"I respectfully request your advice and official opinion in answering the following questions:

"1. Section 165.014 provides for the adjustment and apportionment of property and indebtedness when boundary lines are changed between school districts. If part of the territory of a bonded school district is attached to another district by change of boundary lines, would the boards of education of the districts affected be authorized by this law to apportion the indebtedness between the districts affected on the basis of assessed valuation taken from the bonded district as compared with the remaining assessed valuation of the bonded district?

"If so, how may the board of education establish such a legal adjustment and make payment of the amount due on the bonded debt?

* * * * *

Sections 165.014 and 165.015, RSMo., Cum. Supp. 1955, read as follows:

Sec. 165.014. "1. Whenever (1) any school district is abolished and its land reverts to or becomes a part of two or more school districts, or (2) a new district is made by the creation of a new city or incorporated

Honorable Hubert Wheeler

town or school district, out of one or more school districts, or (3) the boundary lines of any district are changed by the changing of the boundary lines of any city, incorporated town, or school district, or (4) any part of any school district is merged with any other district or districts or parts thereof, the boards of directors or boards of education of the school districts to which land has been annexed or from which land has been taken, or which have been newly created, shall make a just and proper adjustment and apportionment of all school property, real and personal, including funds, as well as indebtedness, if any, to and among such school districts. Such adjustment and apportionment shall be made as of the date of the decree or order creating the new city or town or of the vote of the electors effecting such annexation, change of boundaries, or merger.

"2. In making the adjustment and apportionment of property and indebtedness mentioned in subsection 1, the amount and assessed value of land acquired by or taken from the districts, as compared with the amount and assessed value of the other land in the districts, as well as the value of the school grounds, together with the buildings thereon, and the furniture and equipment therein, and any other school property in such districts, shall be taken into consideration in determining the amount, if any, that shall be paid by one district to another, or in apportioning the indebtedness, if any, that shall be assumed and paid by any of the districts. Such adjustment and apportionment of property and liability shall be made by the boards of school directors of the several districts concerned, before or during the first school year after such boundaries have been changed."

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Section 165.015. "1. If the boards of directors or boards of education of the several districts cannot agree upon an adjustment and apportionment of property and indebtedness as provided in section 165.014, the board of either district may appeal to the county superintendent of public schools, or in case the affected districts are in more than one county, to the county superintendents of both counties, who shall either individually or jointly as the case may require, appoint four persons as a board of arbitration to make an adjustment and apportionment of property and indebtedness in accordance with section 165.014. The board of arbitration and county superintendents shall proceed in the manner as provided by section 165.170 but it may hold hearings after giving the affected districts reasonable notice thereof before making its award.

"2. Any sum awarded by agreement of the boards of directors or boards of education or by decision of a board of arbitration to any school district shall be a legal and valid claim in its favor and against the school district charged therewith. The amount of debt, if any, apportioned to any school district shall be a legal and valid claim against the school district charged therewith. Upon the filing of the agreement of the boards of directors or boards of education or of the decision of the board of arbitration with the county superintendent, the claim or indebtedness charged against any school district may be collected in the same manner as other claims against a school district."

These two sections were enacted in 1955 by the 68th General Assembly, repealing and replacing Sections 165.180, 165.183, 165.290 and 165.293, RSMo 1949.

Under Section 165.014, supra, when land is taken from a bonded district and attached to another district, the boards of education "shall make a just and proper adjustment and apportionment of all school property, real and personal, including funds, as well as indebtedness, * * * to and among such school districts." (Emphasis ours.)

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In Subsection 2 of Section 165.014, supra, a guide is given whereby school boards may determine what a just and proper adjustment and apportionment is. It is specified therein that in making such adjustment and apportionment the amount and assessed value of land acquired by or taken from the districts, as compared with the amount and assessed value of the other land in the districts, as well as the value of the school grounds, together with the buildings thereon, and the furniture and equipment therein, and any other school property in such districts, shall be taken into consideration. Clearly, the boards of education may not consider only the assessed valuation of the detached portion of the district, as compared to the remaining assessed valuation of the bonding district, but must also consider the other factors underscored above.

In saying that these things listed in the statute "shall be taken into consideration," we do not understand the Legislature to mean that these are the only things which may be taken into consideration by the boards of directors in making their adjustment and apportionment. Other factors not so readily apparent may also be present in any given situation which could well be taken into consideration in arriving at a "just and proper" adjustment and apportionment. It would be impossible to anticipate all the problems which might arise in a situation such as this. The underlying principle, however, is to arrive at an adjustment and apportionment which, under the facts of any given case, is just and proper.

There are, of course, no Missouri cases construing Sections 165.014 and 165.015, supra, and although we have examined many cases in other jurisdictions, we find them of very little help because based on differently worded statutes. For example, a Michigan statute made the change in boundary lines or separation from the indebted district contingent upon an apportionment of the indebtedness. Board of Supervisors v. Thompson, 61 Fed. 914, 10 C.C.A. 154. In addition, the courts apparently have different conceptions of the basis to be used in arriving at an equitable settlement of the property and indebtedness in cases like this.

For example, in State ex rel. Board of Education of Swanton Village School Dist. v. Board of Education of Sharples Village School Dist., 114 Ohio St. 603, 151 NE 669, under a statute requiring an equitable division of the funds and indebtedness of the two districts, the court held that "a division in the

Honorable Hubert Wheeler

proportion that the taxable value of the transferred district bears to the taxable value of the original district is not only an equitable division, but the only basis upon which an equitable division can be made."

In that case, "indebtedness" was held to include all liabilities incurred prior to the date of the transfer, including bonded indebtedness, contractual obligations, such as building contracts, teachers' contracts, janitors' contracts, and the like, though not as yet fully performed. See also State ex rel. Board of Education of South Zanesville Village School Dist. v. Bateman, 119 Ohio St. 475, 164 NE 516; State ex rel. v. Board of Education, 65 Ohio App. 273, 29 NE2d 878.

In Livingston v. School Dist. No. 7 of Brookings County, 9 So. Dak. 102, 68 NW 167, 169, there was no statute providing for apportionment, but the South Dakota court had a different version of the equities of the situation. At NW 1.c. 169 the court said:

"* * * As we have seen, without some express legislation imposing a liability upon the new districts, they cannot be held liable at law for the debts of the old district, and certainly there are in this case no equitable grounds alleged for imposing a liability for the debt of the old district upon the new. When the inhabitants of the new districts ceased to receive benefits from the school building in the old district, and were compelled to provide new buildings for themselves, they, in justice, were entitled to be relieved from liabilities incurred by the old district for school buildings no longer of any use to them. As between themselves, therefore, there was no liability for which the new districts could be held. * * *"

In construing Section 165.180, RSMo 1949, repealed in the enactment of Sections 165.014 and 165.015, supra, the Kansas City Court of Appeals, in the case of Cleveland Village School Dist. No. 118 of Cass County v. Zion, 195 Mo. App. 299, 190 SW 955, 956, said:

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"* * * Where the statute provides a method of procedure by which the school districts may adjust their differences, that method must be followed. * * * The law contemplates that school matters will be administered by men without technical training in the law, and seeks to provide, in so far as it is possible, a method by which they may adjust their own matters among themselves by a speedy and somewhat informal procedure. * * *"

Consequently, in answer to the first part of your first question, we are of the opinion that, in arriving at an adjustment and apportionment of the property and indebtedness of two districts affected by a change of boundary lines, the boards of education of the two districts must take into consideration not only the ratio which the assessed valuation of the detached portion bears to the remaining assessed valuation of the indebted district but also all the other factors mentioned in Subsection 2 of Section 165.014, supra. We are also of the opinion that such boards may take into consideration other factors which, if present in any given case, may be necessary in order to arrive at a "just and proper" adjustment and apportionment.

The adjustment may be established in one of two ways, either by agreement of the two boards or, if they are unable to agree, by submission to a board of arbitration as provided in Section 165.015, supra. In either event, when the adjustment is made, any sum awarded becomes a valid claim in favor of the district to which awarded and against the school district charged therewith. The same is true of indebtedness charged against one district and in favor of the other.

If territory is detached from a bonded district and annexed to another and upon an adjustment it is determined that the annexing district should assume a portion of the indebtedness of the bonded district, the bondholders must continue to look to the bonded district for the payment of the bonds. The bonded district, in turn, would have a claim against the annexing district for the amount of the indebtedness assumed by it in the adjustment.

In *Turnbull v. Board of Education*, 45 Mich. 496, 8 NW 65, 66, the Michigan court said:

Honorable Hubert Wheeler

"* * * A debt once existing must remain a debt against the corporation that created it, and its obligation is not destroyed by a change in corporate limits. If contribution is required, it must be obtained by the corporation and not by its creditors, unless otherwise provided by law."

In Cleveland Village School Dist. No. 118 of Cass County v. Zion, supra, at SW 1.c. 957, the Missouri court said, with relation to the formerly existing sections on this subject:

"We are of the opinion that these sections provide the only law applicable to the division of the property of the disorganized district, and that the procedure pointed out therein should be followed. When that is done and the rights of both districts are determined, if defendant still refuses to pay over the money, a remedy can be had to compel its payment."

Therefore, we are of the opinion that payment of the amount of indebtedness apportioned to one of the districts may be made and enforced the same as any other valid claim against the district.

CONCLUSION

It is the opinion of this office that in making an adjustment and apportionment of the property and indebtedness of two school districts when the boundary lines are changed, the boards of education must take into consideration all the factors mentioned in Section 165.014, RSMo., Cum. Supp. 1955, and may consider other factors if necessary in order to arrive at a just and proper adjustment and apportionment. The adjustment may be established either by agreement of the boards of education or by arbitration as provided in Section 165.015, RSMo., Cum. Supp. 1955, and may be paid and collected as any other valid claim against the district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml:10
Encs (2)

SOCIAL SECURITY:



A county which has accepted the provisions of Chapter 105 RSMo Cum. Supp. 1955, extending the benefits of Title 2 of the Social Security Act (42 U.S.C.A. Sec. 401 et seq.) to its employees, is required to pay into the state contribution fund, with respect to wages, amounts at the rates specified in the plan and agreement; and that the county or the proper official thereof can deduct such amounts from wages paid to an elective county official, such as the prosecuting attorney.

March 8, 1957

Honorable Roy Wilson
Clerk of the County Court
Carter County
Van Buren, Missouri

Dear Mr. Wilson:

Reference is made to your request for an opinion of this office, wherein you inquire as to whether a county, which has adopted the provisions of Chapter 105 RSMo Cum. Supp. 1955, is required to withhold social security contributions from the salary or wages due an elective or appointive county official, such as the prosecuting attorney.

Section 105.350 authorizes each political subdivision of the state to submit to the state agency, for approval, a plan and agreement for extending the benefits of Title 2 of the Social Security Act (42 U.S.C.A. Sec. 401 et seq.) to its employees. Said section provides that said plan shall be approved by the state agency if, among other things, it provides that "all services which constitute employment, as defined in Section 105.300, and are performed in the employ of the political subdivision" are covered by the plan.

The term "employment" is partially defined in Section 105.300 as follows:

"'Employment', any service performed by any employee of the state or any of its political subdivisions or any instrumentality of either of them, which may be covered' under applicable federal law, in the agreement between the state and the Secretary of Health, Education and Welfare, except services, which in the absence of an agreement entered into under sections 105.300 to 105.440 would constitute 'employment' as defined in section 210 of the Social Security Act (42 U.S.C.A. §410); * * *".

Honorable Roy Wilson

The term "employee" is defined in said section as follows:

"'Employee', elective or appointive officers and employees of the state, including members of the general assembly, and elective or appointive officers and employees of any political subdivision of the state, or any instrumentality of either the state or such political subdivisions; and employees of a group of two or more political subdivisions of the state organized to perform common functions or services;"

It is readily apparent that an elective county official, such as the prosecuting attorney, falls within the definition of "employee", for the purpose of this law, and is, while discharging the duties of his office, in employment as that term is defined.

Section 105.370 RSMo Cum. Supp. 1955, provides that each political subdivision, whose plan has been approved, shall pay into the contribution fund, with respect to wages, contributions in the amounts and at the rates specified in the agreement entered into by and between the subdivision and the state agency. Said section then provides that the political subdivision may deduct such contributions from the wages when paid as follows:

"2. All moneys in the fund shall be mingled and undivided. Subject to the provisions of sections 105.300 to 105.440, the state agency is vested with full power, authority and jurisdiction over the fund, including all moneys and property or securities belonging thereto, and may perform any and all acts which are necessary to the administration thereof consistent with the provisions of sections 105.300 to 105.440."

You further inquire whether the county is required to make other withholdings. We assume that you refer to withholdings required by the federal government under the Internal Revenue Code. Since this would involve an interpretation of federal law rather than state law, we suggest that you submit your inquiry directly to the appropriate district director of internal revenue.

CONCLUSION

Therefore, it is the opinion of this office that a county which has accepted the provisions of Chapter 105 RSMo Cum. Supp. 1955, extending the benefits of Title 2 of the Social Security Act

Honorable Roy Wilson

(42 U.S.C.A. §401 et seq.) to its employees, is required to pay into the state contribution fund, with respect to wages, amounts at the rates specified in the plan and agreement, and that the county or the proper official thereof can deduct such amounts from wages paid to an elective county official, such as the prosecuting attorney.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG/ld

SCHOOLS:
PURCHASE OF
SURETY BONDS:

Successful bidder on a public works contract has discretion as to a selection of the surety or sureties for a surety bond. School bond cannot require that successful bidder purchase surety bond from a particular agent or broker.



November 8, 1957

Honorable Charles A. Witte
State Senator, 14th District
Route 1, Box 1547
Kirkwood 22, Missouri

Dear Senator Witte:

This is in answer to your opinion request to this office dated September 30, 1957, which reads as follows:

"May a school district, in connection with letting of contracts for construction of public works require that the successful bidder under competitive bids obtain a surety bond from a particular agent or broker named in the contract documents; or is such action violative of the competitive bid requirement or other provisions of law relating to contracts on public works."

With regard to surety bonds of public works contractor, Section 107.170, RSMo 1949, provides in part as follows:

It is hereby made the duty of all officials, boards, commissions, commissioners or agents of * * * any * * * school * * * district in this state in making contracts for public work of any kind to be performed for the * * * school * * * district to require every contractor for such work to execute a bond to the * * * school * * * district * * * with good and sufficient sureties and in an amount to be fixed by said officials, boards, commissions, commissioners or agents and such bond among other conditions shall be conditioned for the payment of material lubricants, oil, gasoline, grain, hay, feed, coal, and coke, repairs

Honorable Charles A. Witte

on machinery, groceries and foodstuffs, equipment and tools, consumed or used in connection with the construction of such work, and all insurance premiums, both compensation, and all other kinds of insurance, on said work, and for all labor performed in such work whether by subcontractor or otherwise."

As can be seen from a reading of the above statutory provisions, the officials of a school district have the duty and are given the power to require that a contractor doing work for the school district give a surety bond. As to the bond itself, the statute requires that it have "good and sufficient sureties"; be in an amount to be fixed by the officials of the school district; and provide for the payment of certain named liabilities incurred by the contractor in the course of the construction. The statute does not give the officials of the school district the duty or the power to designate from whom the contractor shall purchase the bond or who said contractor shall select to be surety or sureties thereon. The statute only gives the officials of the school district the power to determine whether the surety or sureties offered by the contractor are "good and sufficient".

In *State ex inf. v. Madgett*, 297 S.W. 2d 416, which involved ouster proceedings against the Buchanan County judges, and which ouster was ordered by the court, one of the contentions upon which the Missouri Supreme Court upheld the ouster was that the judges of the county court required as a condition to their approval of the county collector's bond that a certain individual agent would be allowed to write a portion of the bond. The Supreme Court held that it was no concern of the county court as to what agent or broker wrote the official bond of the county collector and received the commission thereon. It is the opinion of this office that this case is applicable to your specific question, and would also apply with relation to any other bond contemplated by a contract or a statute.

CONCLUSION

It is the opinion of this office that a school district cannot require that the successful bidder on a public works contract obtain a surety bond from a particular agent or broker named in the contract documents as the school district has only the power to determine whether the surety or sureties

Honorable Charles A. Witte

offered by the successful bidder are "good and sufficient". The selection of the surety or sureties for the successful bidder's surety bond is a matter entirely within the discretion of the successful bidder.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard W. Dahms.

Yours very truly,

John M. Dalton
Attorney General

RWB/b1

DISSOLUTION OF
BENEVOLENT
CORPORATIONS:

The proper method of securing service upon a benevolent corporation which has no place of business and whose officers are all deceased is by publication.



January 4, 1957

Honorable James E. Woodfill
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I have been requested to institute proceedings by information in the nature of a quo warranto under Section 352.240 of the Missouri Revised Statutes of 1949. The grounds for such proceeding are that the corporation has neglected to use its franchises for two years last past. In fact, I am informed that the corporation has no property or assets, has no business office, has elected no officers since about 1930 and the last known officers are deceased. The corporation was organized in 1925 under what is now Chapter 352 of the Missouri Revised Statutes for 1949 and has a perpetual existence. It was apparently abandoned about 1930 and now another group of persons desire to incorporate under the same name but were denied corporate existence by the Secretary of State because the old corporation is actually still in existence, even though it has neglected to use its franchise.

"In an early case it was held that where the complaint is that the corporation, legally organized, has

Honorable James W. Woodfill

ceased to exist or there has existed an entire non-user of corporate franchises and a neglect to choose corporate officers for a great length of time, the Corporation itself is the proper defendant in quo warranto. State ex inf. Wear vs. Business Men's Athletic Club, 163 S.W. 901.

"My inquiry is as to the question of service on the corporation. Under the above circumstances, the only service possible would be by publication such as is provided in Section 351.555 which relates to the dissolution of business corporations. But I find no statute authorizing such service by publication on benevolent corporations proceeded against by quo warranto as provided in Section 352.240.

"Would your office please render to me an opinion on the following questions:

"1. What would be the proper method of service in the above proceeding?

"2. If the proceeding is at the relation of a private person, is it necessary to first secure the consent of the Circuit Court before filing same?

"I shall appreciate your opinion on the above matters."

Paragraph 4 of Section 352.240, RSMo 1949, reads:

"4. And it shall be the duty of the attorney general, or circuit or prosecuting attorney of the proper circuit or county; whenever any credible person shall, in writing, make complaint to him upon affidavit of information

Honorable James E. Woodfill

and belief, that any corporation formed under this chapter has, in any material matter, willfully misused, or, for two years last past, has neglected to use its franchises, or has otherwise become liable to forfeit its charter, to inquire diligently into the grounds of such complaint, and upon reasonable cause shown therefor, to institute proceedings by information in the nature of a quo warranto, looking to a dissolution of such corporation and a forfeiture of its corporate rights."

Section 351.555, RSMo 1949, reads:

"Every information in equity for the dissolution of a corporation shall be filed by the attorney general in the circuit court of the city or county in which the registered office of the corporation is situated. Upon the filing of such information in equity, summons shall issue, which summons shall be served by leaving a copy thereof with any officer or agent of such corporation if he can be found in such county. In case a return is made thereon that no officer or agent of such corporation can be found in such county, then the attorney general shall cause publication to be made in some newspaper published in the county where the registered office of the corporation is situated, containing a notice of the pendency of such suit, the names of the parties thereto, the title of the court, and the time and place of the return of the summons. The attorney general may include in one notice the names of any number of corporations against which informations are filed returnable to the same term of court. The attorney general shall cause a copy of such notice to be mailed to the corporation at its registered office within ten days after the first publication thereof. The certificate of the attorney

Honorable James E. Woodfill

general of the mailing of such notice shall be prima facie evidence thereof. Such notice shall be published at least once each week for three successive weeks, and the first publication thereof may begin at any time after the return is filed. Unless a corporation shall have been served with summons, no default shall be taken against it at any term of court which begins within thirty days after the first publication of such notice. The cost of publication of such notice shall be paid by the state, unless the decree is against the corporation and such cost can be collected from it. The cost of publication shall include full payment for three publications of such notice and for the certificate of the publisher that such publication was made, and shall not exceed the sum of ten dollars and in addition thereto the sum of twenty-five cents for each corporation named in such notice. No other costs or charges shall be allowed or paid for any other service performed with relation to such information in equity."

While it is true that the above does not specifically mention benevolent corporations we believe that it is the clear intent of the statute that benevolent corporations come within its compass as to the matter of service.

Since no service would be possible under the circumstances set forth by you other than by publication we believe that this would be the proper manner of service since there are no officers upon whom service can be had. If this were not the case then there would be no method of dissolving such a corporation as you have in mind and we cannot believe that our law would be inadequate to handle situations of this sort.

As to your second question, we believe that a private individual filing such a proceeding as is here under discussion must obtain leave of court. In the case of State

Honorable James E. Woodfill

ex rel. Stewart v. McIlhany, 32 Mo. 379, 1. c. 382, the Missouri Supreme Court stated:

"Where the attorney general files an information ex officio, it is not necessary for him to obtain the leave of the court. But informations at the relation of private persons, whether under the statute of Anne or under our statute, or exhibited as at the common law, can be filed only by leave of the court. The information is not granted as of course, but depends upon the sound discretion of the court under the circumstances of the case."

In the case of State v. Rose, 84 Mo. 198, 1.c. 201, the court stated:

"1. There is no doubt about the jurisdiction of the circuit court. It is an information filed by the prosecuting attorney ex officio. Informations by the attorney general or prosecuting attorney, ex officio, may be filed without leave, as a matter of course. Informations by either officer, at the relation of an individual, must be filed by leave of court. State ex rel. Stewart v. McIlhany, 32 Mo. 382; State ex rel. v. Hequembourg, 38 Mo. 535; State ex rel. v. Vail, 53 Mo. 97; State ex rel. v. Townley, 56 Mo. 107."

As late as 1945 the Rose case was cited with approval in the case of State v. Beciman, 353 Mo. 1015, 1.c. 1022.

CONCLUSION

It is the opinion of this department that the proper method of securing service upon a benevolent corporation

Honorable James E. Woodfill

which has no place of business and whose officers are all deceased, is by publication.

It is the further opinion of this department that in such proceeding by a private individual leave of court must first be obtained.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc

SPECIAL BENEFIT
ASSESSMENT ROAD
DISTRICTS:
BOUNDARY EXTENSION:

Boundaries of special benefit assessment road districts of non-township organization county cannot be extended by method authorized in Section 233.155, RSMo 1949, for extension of boundaries of special city or town district of non-township organization counties. Dissolution of a special benefit assessment road district of non-township organization county by method authorized in Section 233.290 or Section 233.295, RSMo 1949, followed by the organization of a new enlarged district of the same kind, not effective as means to enlarge boundaries of former district, but effective means for establishing new benefit assessment district with certain proposed boundaries.



January 28, 1957

Honorable Thomas G. Woolsey
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Woolsey:

Your recent request for our legal opinion reads as follows:

"Section 233.155 of the Missouri Revised Statutes, 1949, provides a method and manner to extend the boundaries of a Special Road District within which is located a city, town, or village containing less than 100,000 inhabitants.

"Section 233.170 - 233.315, both inclusive, of the Missouri Revised Statutes, 1949, appear to be the only laws governing Special Road Districts in counties not under township organization in which such road districts there are no cities, towns, or villages. Said Section containing no provision to expand or enlarge the boundaries of such districts. I would appreciate your furnishing me with an official opinion as to the following:

"(1) Are the provisions of Section 233.155 of the Missouri Revised Statutes, 1949, available to and applicable to Special Road Districts in counties not under township organization and in which such road districts there are no cities, towns, or villages?

Honorable Thomas G. Woolsey

"(2) If not, is the only means available to enlarge the boundries of such special road district a dissolution of the district followed by the creation of a new and different road district with the new desired boundries."

Sections 233.170 to 233.315, inclusive, RSMo 1949, are in regard to the organization, powers, duties of the commissioners, and methods of dissolution of special benefit assessment road districts in non-township organization counties. None of said sections provide a method by which the boundaries of such a district may be extended in order to take in additional territory.

Sections 233.010 to 233.165, inclusive, RSMo 1949, are in regard to the organization, powers, duties of the commissioners, and certain other statutory provisions relating to special eight mile road districts in non-township organization counties. Among such sections is Section 233.155, which contains the statutory procedure for extending the boundaries of such a district.

It is noted that no statutory method exists by which the boundaries of a benefit assessment district may be enlarged. Section 233.155, RSMo 1949, applies only to special eight mile districts and the procedure therein authorized for enlarging the boundaries has no application to benefit assessment districts. Therefore, our answer to the first inquiry of the opinion request is in the negative.

The second inquiry, in effect, asks that if the answer to the first inquiry is in the negative, then are the only means available for enlarging the boundaries of a special benefit assessment district by a dissolution of said district followed by the creation of a new and different district with the desired boundaries.

Sections 233.290 and 233.295, RSMo 1949, contain separate and different methods for dissolving a benefit assessment district, and the distinguishing characteristics of each procedure were discussed in an opinion of this department written for the Judges of the Osage County Court on September 5, 1953. A copy of said opinion is enclosed for your consideration.

If a benefit assessment district were to be dissolved as suggested in the second inquiry, the dissolution must be in accordance with Sections 233.290 or 233.295, as these are the

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only statutes authorizing dissolution of such districts. After dissolution under either procedure, the former district would be legally nonexistent and, even though a new district of the same kind were organized from the same territory together with new territory (desired to be included in the former district), such action would not have the effect of enlarging the boundaries of the former district, since the new district would be entirely separate and have no connection whatsoever with the original district.

While the boundaries of the original district could not be enlarged in the manner suggested, it does appear that the dissolution of the old district, the formation of the same kind of new district with the same land as the former and such additional territory as might be desired, would for all practical purposes accomplish the desired results.

CONCLUSION

Therefore, it is the opinion of this department that the boundaries of a special benefit assessment road district, of a county not under township organization, cannot be extended by following the procedure authorized by Section 233.155, RSMo 1949, for extension of the boundaries of a special city or town road district of a county not under township organization.

It is further the opinion of this department that the dissolution of a special benefit assessment road district of a county not under township organization, in accordance with Section 233.290 or 233.295, RSMo 1949, followed by the organization of a new enlarged district of the same kind, will not have the effect of extending the boundaries of the former district, but will serve as an effective means for accomplishing the results desired in establishing a special benefit assessment district with certain proposed boundaries.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

PNC:lc:hw

enclosure

COUNTY COURT: The county court of Vernon County, Missouri may
COUNTY PARKS: appropriate a sum of money, not to exceed five
per cent of the county revenue fund, for the
erection of a building upon land donated to the
county for county park and recreational purposes.



March 12, 1957

Honorable James E. Woodfill
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Sir:

Your recent request for an official opinion reads
as follows:

"The County Court of Vernon County,
Missouri, has asked me to contact
your office for an official opinion
concerning the interpretation of
Section 64.450 of the Missouri Re-
vised Statutes of 1949.

"The Youth Fair Organization of this
county is planning on giving approxi-
mately 40 acres of unimproved land to
Vernon County. The long range plan
is that this 40 acres, along with an
adjoining 40 acres, is to be used as
a Public Park and Fairgrounds. The
County Court has this year planned
to appropriate some \$3,500.00 for
the erection of a building on this
property. This proposed building is
to be primarily used by the Youth
Fair once each year to carry on
their activities--including the
showing of their exhibits. The rest
of the year the building would be
available to the general public.
The theory of this proposed appro-
priation seems to be that the area
will sometime in the future become

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a Public Park and that this is merely the first step, hence the appropriation is proper under Section 64.450.

"There is in my mind a serious question as to whether this would be a proper expense under this section of the statutes. It seems to me that the proper procedure in the case would be to proceed under Section 262.500 of the Missouri Revised Statutes, this statute calling for an election.

"My first inquiry is whether the expense set out above is authorized under Section 64.450.

"If this expense is not authorized by said section, would said section allow the County Court to purchase the tract of land from the Youth Fair Organization and develop the same into a County Park, permitting the Youth Fair Organization and any other organizations to construct their own buildings thereon subject to the approval of the County Court?"

We are informed that the land in question has been deeded to Vernon County.

Section 64.450, RSMo 1949, to which you refer, reads as follows:

"County courts in all counties in the state of Missouri may set aside five per cent of the county revenue fund for the purchase of county parks and the maintenance thereof.

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Titles to land purchased shall be taken in the name of the county, and each court is authorized to set aside a sufficient amount each year for the maintenance of said parks when purchased."

Section 262.500, RSMo 1949, to which you refer, provides for an election to levy a special tax "* * * for the purpose of encouraging, promoting and improving the livestock, poultry, agricultural, horticultural, mechanical fabrics and fine arts, products and articles of domestic industry, and the exhibition of such stock, poultry articles and commodities, at the district or county fair held in such county."

This section goes on to provide that the county court may purchase grounds and erect suitable buildings for such fair purposes.

It would clearly appear that the erection of the building which is contemplated on this ground is a proper structure for park purposes. In the case of Aquamsi Land Company v. City of Cape Girardeau, 142 S.W. 2d 332, at l. c. 335, the Missouri Supreme Court stated:

"Appellant's brief substantially quotes the following definition of a park from Williams v. Gallatin, 229 N.Y. 248, 253, 128 N.E. 121, 122, 18 A.L.R. 1238, 1241: 'A park is a pleasure ground set apart for recreation of the public, to promote its health and enjoyment.' But the brief makes no reference to what follows immediately thereafter; 'It need not, and should not, be a mere field or open space, but no objects, however worthy, * * * which have no connection with park

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purposes, should be permitted to encroach upon it without legislative authority * * *.' (*Italics ours.*) Enumerating structures which do have a natural connection with park purposes, and therefore require no special legislative sanction, the opinion says: 'Monuments and buildings of architectural pretension which attract the eye and divert the mind of the visitor, floral and horticultural displays, zoological gardens, playing grounds, and even restaurants and rest houses, and many other common incidents of a pleasure ground, contribute to the use and enjoyment of the park. The end of all such embellishments and conveniences is substantially the same public good. They facilitate free public means of pleasure, recreation and amusement, and thus provide for the welfare of the community. The environment must be suitable and sightly or the pleasure is abated. * * *'. "

We believe that the county court, in the situation which you present, may proceed under Section 64.450 provided, of course, that the sum of money appropriated does not exceed five per cent of the county revenue fund which is the restriction upon expenditures set forth in Section 64.450. It would appear that Section 262.500 was aimed at an entirely different purpose, namely, the maintenance and support of a county or district fair. This, obviously, is not the purpose in the situation which you present but it is rather the object in that case to establish a county park. We believe that such expenditure by the county court

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would be legal and proper.

CONCLUSION

It is the opinion of this department that the county court of Vernon County, Missouri, may appropriate a sum of money, not to exceed five per cent of the county revenue fund, for the erection of a building upon land donated to the county for county park and recreational purposes.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc